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## IS THE RIGHT TO DIE DEAD?

Vincent J. Samar\*

### INTRODUCTION

On June 26, 1997, the United States Supreme Court unanimously rejected two facial challenges to laws prohibiting physician-assisted suicide in the states of Washington and New York.<sup>1</sup> In *Washington v. Glucksberg*,<sup>2</sup> several terminally-ill patients, their physicians, and various state officials challenged Washington's criminal prohibition of physician-assisted suicide on the ground that the statute violated the Due Process Clause of the Fourteenth Amendment. In *Vacco v. Quill*,<sup>3</sup> a similar group of plaintiffs challenged a New York statute which allowed a terminally-ill patient to refuse life-sustaining treatment, yet prohibited any person from assisting the patient in terminating his or her own life. Here however, the plaintiffs challenged the statute under the Equal Protection Clause of the Fourteenth Amendment.

In this essay, I maintain that the issue of whether the right to die is viable as a constitutionally protectable right remains open. I intend to reconcile the Court's holdings in *Glucksberg* and *Quill* by examining the different rationales the Justices offered for their decisions. I do not believe this issue can be resolved simply by asserting that the intention of the actor is different when assisting suicide, as compared to when life-sustaining treatment is withdrawn. Rather, the right to die continues to be viable due to the level of abstraction at which the Court chose to frame the issue in these cases.

In *Glucksberg* and *Quill*, the Court may have sought to avoid progressing ahead of the political process. On their face, the holdings in *Glucksberg* and *Quill* were viewed by the Court as a means of resolving the difficult mix of issues, including the protection of a patient's

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1. See Linda Greenhouse, *No Help for the Dying; But Justices Leave Door Open to a Future Claim of a Right*, N.Y. TIMES, June 27, 1997, § 1, at 1.

2. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

3. *Vacco v. Quill*, 521 U.S. 793 (1997).

true intentions.<sup>4</sup> However, had the Court chosen to frame the issue at a higher level of abstraction, it may have reached a more liberal result. However, choosing this methodology may have raised other issues that the Court was not ready or willing to address. For example, specifying the procedures for terminating life, and determining the boundary lines for assessing whether the patient desires to die.<sup>5</sup>

Thus, this article will focus on two questions. First, why did the Court choose to frame the issue at a lower level of abstraction? Second, what factors would encourage framing the issue differently in the future? *Glucksberg* and *Quill* are interesting, not so much because of what the Court held, but rather because of what it did not hold. The latter may have the greater impact on decisions in future cases.

This impact is a product both of what the Court did, and what it failed to do, in *Glucksberg* and *Quill*. The latter restrains the former. However, the latter is also restrained due to moral disagreement in our society pertaining to what the right to die means, if the right even exists, and to whom it applies. As a result, courts reluctantly enter into this debate.<sup>6</sup> In this essay, I will follow two principal themes. First, this article will make coherent the language of the various concurring opinions that illustrate the reasons Justice O'Connor joined the majority opinion and why the other Justices joined in the result. Second, this article illustrates how a broader moral analysis provides further guidance for courts that may confront this same issue in the future.<sup>7</sup> In particular, I focus on Justice O'Connor's concurring opinion because, as I contend in this analysis, I believe her opinion represents more of an attachment to the particular facts of these two cases, rather than an agreement with the majority on broad principles of law governing the right to die.

## II. THE ACTUAL DECISIONS OF THE COURT

In *Glucksberg*, Chief Justice Rehnquist, writing for a five member majority (including Justices Scalia, Kennedy, Thomas and O'Connor),

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4. Cass Sunstein characterizes this issue as an example of how the Court seeks to protect its own constitutional legitimacy in a context where the following circumstances exist: religious convictions are not excessive, there is a place for considered public judgments, and there exists little inequality or prejudice. See CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT*, (1999) 98-104.

5. *Id.* at 104.

6. See *infra* notes 7-13 and accompanying text.

7. But see RICHARD POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999) (arguing against the use of moral theory in legal decision making).

engaged in the backward-looking approach of due process analysis.<sup>8</sup> Chief Justice Rehnquist noted at the outset that “we begin [our analysis], as we do in all due process cases, by examining our nation’s history, legal traditions, and practices.”<sup>9</sup> Chief Justice Rehnquist then reviewed the early history of the law in the right to die area by stating that “for 700 years, the Anglo-American common law tradition has punished or otherwise disapproved of both suicide and assisting suicide.”<sup>10</sup> During the colonial period, state legislatures similarly disapproved of the practice of assisted suicide. Although in recent years, some states have been willing to reexamine these policies, many have concluded in favor of retaining an out-right prohibition.<sup>11</sup> For instance, in 1975, the Washington State Legislature decided to prohibit assisted suicides, though for years it allowed, and continues to allow, a personal choice to withhold life-sustaining treatment.<sup>12</sup>

In *Glucksberg*, the Court was also concerned that the Fourteenth Amendment liberty interest it was being asked to protect, would halt public debate on the ethical, legal, and practical aspects of the issue. Chief Justice Rehnquist explained:

We ‘have always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this uncharted area are scarce and open-ended.’ . . . [B]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore ‘exercise the utmost care whenever we are asked to break new ground in this field,’ . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.<sup>13</sup>

The excerpt demonstrates the Court’s intent to avoid substituting its judgment for that of elected policymakers. In this sense, the argument supports a preference for a representative democracy.

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8. Cass Sunstein has suggested this difference between due process and equal protection analyses:

The Due Process Clause often looks backward; it is highly relevant to the due process issue whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice under attack. By contrast, the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure. The two clauses therefore, operate along different tracks.

Cass Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163-79 (1988).

9. *Glucksberg*, 521 U.S. at 710.

10. *Id.* at 711.

11. *Id.* at 712-16.

12. *Id.* at 716-17.

13. *Id.* at 720.

Additionally, the *Glucksberg* Court noted that even in a prior case, where the Court assumed there was a right to discontinue unwanted medical treatment, it did not deduce such a right "from abstract concepts of personal autonomy."<sup>14</sup> Rather, the Court followed a long-standing common law tradition that treated forced medication as battery.<sup>15</sup> Strategically, the Court avoided being forced to recognize the right to die on any grounds other than common-law precedent.

However, the Court did not foreclose the possibility that the facts of a future case may persuade it to hold differently. In leaving the question open, the Court conceded that foreclosing the issue would not carry public support in cases involving a different factual circumstance where a person might be exposed to unbearable suffering. As a pragmatic result, the majority was also able to obtain Justice O'Connor's vote. Regardless of the Court's motives, footnote 24 of the majority opinion explicitly states that the Court did not foreclose the possibility that an individual plaintiff, in a more particularized challenge, may have a claim to seek a physician's assistance in hastening his own death.<sup>16</sup> However, the Court did illustrate that such a claim would be radically different than the one presented in *Glucksberg*.<sup>17</sup>

In *Quill*, the Court followed the forward-looking approach of equal protection analysis.<sup>18</sup> Again, writing for the majority, Chief Justice Rehnquist framed the issue as whether the Second Circuit Court of Appeals correctly reversed the district court. The district court recognized "a difference between allowing nature to take its course, even in the most severe situations, and intentionally using an artificial death-producing device."<sup>19</sup> Criticizing the court of appeal's reversal, Chief Justice Rehnquist adopted the district court's distinction between a physician withdrawing life-sustaining treatment for the terminally-ill, and a physician acting affirmatively to assist in his patient's death. Specifically, Chief Justice Rehnquist criticized the Second Circuit's holding stating:

[S]ome terminally ill people—those who are on life-support systems—are treated differently than those who are not, in that the

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14. *Id.* at 725 (discussing *Cruzan v. Director, Missouri Dept. of Health*, 467 U.S. 261, 280 (1990)). However, this may not have been an accurate representation of what the Court held in *Cruzan*. In *Cruzan*, the Court treated the right to die as a Fourteenth Amendment liberty interest protected under the Due Process Clause, not as a fundamental right to privacy. *See id.* at 278-79; *see also* VINCENT J. SAMAR, *THE RIGHT TO PRIVACY: GAYS, LESBIANS AND THE CONSTITUTION* 198 (1991).

15. *Glucksberg*, 521 U.S. at 725.

16. *Id.* at 735 n.24.

17. *Id.*

18. *See* SUNSTEIN, *supra* note 8, at 1162-79.

19. *Quill*, 521 U.S. at 798.

former may 'hasten death' by ending treatment, but the latter may not 'hasten death' through physician-assisted suicide . . . . This conclusion depends on the submission that ending or refusing life sustaining medical treatment 'is nothing more or less than assisted suicide.' . . . Unlike the Court of Appeals, we think the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical; it is certainly rational.<sup>20</sup>

The primary justification for the Chief Justice's conclusion was that "the distinction comports with fundamental legal principles of causation and intent. First, when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology, but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication."<sup>21</sup>

In essence, the Court treated the withdrawal of life-sustaining treatment differently from that of euthanasia. Some commentators have labeled such action passive euthanasia. In other words, allowing someone to die, as opposed to actively causing their death.<sup>22</sup> A distinction is drawn between an outside intentional act that causes death, and an action that appears to be devoid of such intention.<sup>23</sup> In *Glucksberg* and *Quill*, the Court did not overtly adopt this distinction. However, as I will argue, the Court implied the distinction by asserting that so long as the removal of life-sustaining treatment was protected by statute, such action satisfied any constitutional requirement for liberty. The significance of this interpretation illustrates the limited precedential value that these cases have toward resolving future cases. As Justice Stevens articulated in his concurring opinion, no real difference exists between assisted suicide and the withdrawal of life-sustaining treatment, or if a difference does exist, it has yet to be fully delineated. As will be shown below, assuming a difference may be demonstrated, the difference cannot be confined merely to the content of the actor's intention.

In *Quill*, the Court did not discuss whether a heightened form of scrutiny, as is applied in race and gender cases, might also be appropriate when an individual is denied a physician's assistance to end his life. Specifically, the Court did not discuss whether terminally-ill patients constitute a suspect or quasi-suspect class warranting a higher

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20. *Id.* at 800-01.

21. *Id.* at 801.

22. JAMES RACHELS, *Euthanasia, Killing, and Letting Die*, in *MORALITY IN PRACTICE* 165 (J. Sterba, 1984).

23. *Id.*

degree of protection.<sup>24</sup> Of course, the right to die cases do not contain characteristics that are historically the basis for invidious discriminatory practices. More importantly, the Court's failure to apply a heightened form of scrutiny, despite that the liberty interest involved a fundamental right, implied that the Court did not believe the liberty interest at issue constituted a fundamental right.<sup>25</sup> Rather, the Court merely applied the rationality test. Thus, the Court inquired only whether New York's reasons for passing the legislation possessed a rational relation to its governmental responsibilities. Citing *Glucksberg*, the Court treated its discussion of Washington's reasons to further amplify and justify, as a matter of equal protection, New York's similar rationale for restricting physician-assisted suicide.<sup>26</sup> In *Glucksberg*, the Court stated that

Washington has an 'unqualified interest in the preservation of human life.' . . . [T]he State also has an interest in protecting the integrity and ethics of the medical profession . . . . Next, the State has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes . . . . The State's interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally-ill people from prejudice, negative and inaccurate stereotypes, and 'societal indifference.' . . . [T]he state may fear that permitting assisted suicide will start it down the path to voluntary and perhaps involuntary euthanasia.<sup>27</sup>

As noted in *Glucksberg* and *Quill*, the Justices were unanimous only in their judgment. Therefore, particular attention must be paid to the way the Justices differed in their concurring opinions. In these concurring opinions, the tenuous nature of the Court's decision to view *Glucksberg* and *Quill* at a certain level of abstraction, and under a certain characterization, was given acute recognition by its own members. Chief Justice Rehnquist wrote for a five member majority that

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24. The standard test for a suspect classification is whether: (1) the group has suffered a history of purposeful discrimination, (2) contrary to the ideals of equal protection, and (3) lacks the political power necessary to obtain redress. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-44 (1985). Race and national origin are good examples of where the Court has applied strict scrutiny to a classification. LAURENCE. H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 14-16, 1466-79 (2nd ed. 1988). An intermediate level of scrutiny applies to gender discrimination because, in some limited contexts, it is thought that basis for discrimination exists. Otherwise, equal protection only requires a rational relation between what the state proposes and a legitimate government interest. RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 610 (1999).

25. See *Glucksberg*, 521 U.S. at 766-67 (Souter, J. concurring) (citing Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 548 (1961); *Reno v. Flores*, 507 U.S. 292, 301-02 (1993); and *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

26. *Quill*, 521 U.S. at 808-09.

27. *Glucksberg*, 521 U.S. at 728-33 (referenced in *Quill*, 521 U.S. at 808-09.).

was joined by Justices Scalia, Kennedy, Thomas, and O'Connor. Justice O'Connor, however, also wrote a concurring opinion joined by Justices Stevens, Souter, Ginsberg, and Breyer.

In Justice O'Connor's concurrence, she explained her position:

I agree that there is no generalized right to 'commit suicide.' But respondents urge us to address the narrower question [of] whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death. I see no reason to reach that challenge in the context of the facial challenges of the New York and Washington laws at issue here . . . . The parties and amici agree that in these States a patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate suffering, even to the point of causing unconsciousness and hastening death.<sup>28</sup>

Justice O'Connor's concurrence suggests that her agreement with the majority is related more to the facts of these two cases, rather than any broad principle regarding the manners in which a state may regulate individuals facing imminent death. Justice O'Connor's concurrence and the concurrences of Justices Souter, Ginsberg, and Breyer, are better explained as efforts to avoid getting ahead of public sentiment on the issue of euthanasia, by making a proclamation concerning the right to physician-assisted suicide that was greater than the specific cases merited. However, such an institutional concern fails to illustrate the factual circumstances which may persuade Justice O'Connor, or the remaining Justices, to decide a future case differently.

Justice Stevens, in his concurring opinion, emphasized the categorical nature of the facial challenge. Justice Stevens began by noting that the State had an "interest in preserving and fostering the benefits that every human being may provide to the community, a community that thrives on the exchange of ideas, expressions of affection, shared memories and humorous incidents, as well as on the material contributions that its members create and support."<sup>29</sup> However, Justice Stevens emphasized that these interests did not support a right to life that was absolute, as is embodied by Washington's death penalty statute.<sup>30</sup> He criticized the majority by recognizing that the right to refuse treatment had its foundation, not in the common law of battery, but rather in a concept of freedom "older than the common law" that recognizes

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28. *Id.* at 736-37.

29. *Id.* at 741 (Stevens, J. concurring).

30. *Id.* at 741-42.



not merely a person's right to refuse a particular kind of unwanted treatment, but also her interest in dignity, and in determining the character of the memories that will survive long after her death . . . . Whatever the outer limits of the concept may be, it definitely includes protection for matters 'central to personal dignity and autonomy.' . . . [A]voiding intolerable pain and the indignity of living one's final days incapacitate[d] and in agony is certainly 'at the heart of [this] liberty.'<sup>31</sup>

Justice Stevens continued by citing *Cruzan* for the proposition that "[a]lthough there is no absolute right to physician-assisted suicide . . . some individuals who no longer have the option of deciding whether to live or to die because they are already on the threshold of death have a constitutionally protected interest that may outweigh the State's interest in preserving life at all costs."<sup>32</sup> Justice Stevens further noted that "the State's interest in the contributions each person may make to society [may] not have the same force for a terminally ill patient faced not with a choice of whether to live, only of how to die."<sup>33</sup>

Justice Stevens was especially critical of the Court's reliance on the distinction between assisting suicide and withdrawing life-sustaining treatment, stating as follows: "There may be little distinction between the intent of a terminally-ill patient who decides to remove her life support and one who seeks the assistance of a doctor in ending her life; in both situations, the patient is seeking to hasten a certain, impending death."<sup>34</sup> Justice Stevens stated that

[t]he doctor's intent might also be the same in prescribing lethal medication as it is in terminating life support. A doctor who fails to administer medical treatment to one who is dying from a disease could be doing so with an intent to harm or kill that patient. Conversely, a doctor who prescribes lethal medication does not necessarily intend the patient's death—rather that doctor may seek to simply ease the patient's suffering and to comply with her wishes.<sup>35</sup>

Justice Stevens concluded that

[t]he illusory character of any differences in intent or causation is confirmed by the fact that the American Medical Association unequivocally endorses the practice of terminal sedation—the administration of sufficient dosages of pain-killing medication to terminally ill patients to protect them from excruciating pain even when it is clear that the time of death will be advanced.<sup>36</sup>

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31. *Id.* at 743-45.

32. *Id.* at 745.

33. *Glucksberg*, 521 U.S. at 746.

34. *Id.* at 750.

35. *Id.* at 750-51.

36. *Id.* at 757.

In short, Justice Stevens criticized the manner in which the majority framed the issue. Specifically, Justice Stevens asserted that the majority attempted to avoid dealing with a complex normative issue by relying on an apparent analytic distinction, the difference between assisted suicide and the withdrawal of life sustaining treatment.

The drawing of such analytical distinctions is not a new tactic for lawyers or philosophers. Recently, this tactic was utilized in cases where plaintiffs asserted that state marriage laws violated the Fourteenth Amendment's Equal Protection Clause by prohibiting same-sex marriages.<sup>37</sup> In those cases, opponents of same-sex marriages argued that marriage, by definition, is a relationship between a man and a woman. In this manner, the opponents of same-sex marriages strived to limit the equal protection analysis by illustrating that the institution of marriage is available to everyone on the same basis.<sup>38</sup> As a result, proponents of same-sex marriages face an uphill battle in attempting to persuade courts to look behind the definition of marriage in order to reach the fundamental concerns of the parties in such cases.<sup>39</sup>

In contrast to Justice Stevens' more restrictive autonomy-based approach, Justice Souter's concurring opinion takes a communitarian line. Rather than evaluating the facts of each case, Justice Souter deferred to the history and tradition of the Due Process Clause. Justice Souter maintained that:

Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our nation, built upon postulates of respect for the liberty of the individual, has struck between the liberty and the demands of organized society. If the supplying of content to this constitutional concept has of necessity been a rational pro-

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37. See, e.g., *Singer v. Hara*, 522 P.2d 1187, 1192, *cert. denied*, 84 Wash.2d 1008 (1974) (citing *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973)) in which the court concluded that the State of Washington's marriage statutes prohibiting same-sex marriage did not violate the state constitution's equal rights amendment because "appellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex." *Id.* As the court observed in *Jones*: "In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage." *Id.*

38. This strategy is obviously a smokescreen to avoid the real issue, which is how marriage ought to be defined if it is to pass constitutional muster. But the smokescreen sometimes works, demonstrating that the choice of level of abstraction with which to view an issue is all-important to its resolution.

39. For a number of different viewpoints on what the political question doctrine means and what its significance is in the law, see *TRIBE*, *supra* note 24 at 96-97.

cess, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.<sup>40</sup>

At this point, Justice Souter's view also raises questions about the scope of the right to die, as well as how its extension is to be determined.

In terms of the level of generality used to analyze this case, Justice Souter noted that we may classify the "proper analysis in any of these ways: as applying concepts of normal critical reasoning, as pointing to the need to attend to the levels of generality at which countervailing interests are stated, or as examining the concrete application of principles for fitness with their own ostensible justifications."<sup>41</sup> However we choose to undertake the analysis, it certainly requires greater detail than previously done.

Justice Souter characterized the respondents' rights in *Glucksberg* and *Quill* as referring to the rights of one narrow class. Justice Souter further examined the state's claim that such rights could not be adequately confined. In particular, he was concerned with the state's argument that different judgments of mental intent would ultimately force a decision in respondents' favor. Such a slippery slope could lead to circumstances where vulnerable and nonconsenting individuals could no longer be protected. In this sense, one might draw a further distinction between not only active and passive euthanasia, but also between voluntary and involuntary euthanasia.<sup>42</sup>

Courts and juries often deal with issues of mental intent. An example is when the finder of fact determines the guilt or innocence of a person charged with first degree murder. Of course, such a decision occurs within a controlled environment where evidence of intent is considered under the guideposts of strict rules. Justice Souter was concerned that if even a limited right to die were recognized, a liberal-

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40. *Glucksberg*, 521 U.S. at 765 (Souter, J., concurring).

41. *Id.* at 773.

42. Drawing these two distinctions creates a matrix in which active and passive euthanasia can be related to voluntary and involuntary euthanasia. In this instance, one sees the threat to liberty increase as one moves from passive/voluntary euthanasia (where it is almost nonexistent) to active/involuntary euthanasia. Hence, here we find some reason for the Court to exhibit reluctance with too sweeping a protection for a right to die. See, e.g., Susan R. Martyn and Henry J. Bourguignon, *Physician Assisted Suicide: The Lethal Flaws of the Ninth and Second Circuit Decisions*, 85 CAL. L. REV. 371, 384 (1997) (discussing the danger of blurring the line between physician-assisted suicide and letting someone die, and the philosophical, moral and pragmatic philosophies to maintain a distinction between the two); see also Antonion P. Tsarouhas, Comment, *The Case Against Legal Assisted Suicide*, 20 OHIO N.U. L. REV. 793, 812-14 (1993) (arguing that assisted suicide places a questionable value on human life).

izing progression may result. In such a situation, the issue often becomes how serious the illness is required to be, and what criteria govern the giving of consent, "until ultimately doctors and others would abuse a limited freedom to aid suicides by yielding to the impulse to end another's suffering under conditions going beyond the narrow limits the respondents propose."<sup>43</sup> Thus, for Justice Souter, "[t]he case for the slippery slope is fairly made out . . . because there is a plausible case [for believing] that the right claimed would not be readily containable" amidst the various competing temptations that might affect a physician's judgment.<sup>44</sup>

Although the possibility of a slippery slope raises the difficult issue of when hastening death might be appropriate, it by no means decides the question. This is particularly true where great pain may be experienced prior to death. Justice Breyer expressed precisely this argument in his concurring opinion.

I would not reject the respondents' claim without considering a different formulation, for which our legislative tradition may provide greater support. That formulation would use words roughly like a right to die with dignity. I do not believe, however, that this Court need or now should decide whether or not such a right is 'fundamental.' That is because, in my view, the avoidance of severe pain (connected with death) would have to constitute an essential part of any successful claim and because, as Justice O'Connor points out, the laws before us do not *force* a dying person to undergo that kind of pain.<sup>45</sup>

Implicit in these views is a further distinction between Justices emphasizing a more fundamental rights approach, specifically Justice Stevens, and in some instances Justice Breyer, and those Justices who adopt a more communitarian analysis, such as Justices Rehnquist, O'Connor, and Souter. The difference between a communitarian and a fundamental rights approach is that the former assumes the content of the right encompasses accepted practices of community life, while the latter treats the content of the right to be universal and barren of specific collateral or historical content. At this point, I ignore whether either approach serves politically liberal or conservative causes. While the latter factors may be present, their emphasis here would

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43. *Glucksberg*, 521 U.S. at 790 (Breyer, J., concurring). Apparently, determining who is terminally ill also raises a number of difficulties. See Yale Kamisar, *The Right to Die: On Drawing (and Erasing) Lines*, 35 DUQ. L. REV. 516-17 (1996).

44. *Glucksberg* 521, U.S. at 785 (Souter, J., concurring)

45. *Id.* at 790-91 (Breyer, J., concurring).

quickly sidetrack us from understanding how the various concurring rationales work to determine future cases.<sup>46</sup>

At least in *Glucksberg* and *Quill*, the distinction between both the communitarian and fundamental rights approaches seems to account for some of the differences in emphasis between the underlying concurring rationales.<sup>47</sup> However, I would like to suggest that this difference be construed in another way, in context to the subtler differences in the level of abstraction implicit within the different concurrences. When these cases are viewed at a lower level of abstraction, what I have labeled as the internal point of view, a more communitarian approach based on values implicit in society's practices tends to dominate. However, this approach gives way to a more fundamental rights approach, which appeals to abstract principles outside the social practice, when those very practices are called into question. This shift will soon become clear when I discuss the problem of drawing a distinction between active euthanasia and the withdrawal of life-sustaining treatment.

In *Glucksberg*, the Court was asked to determine whether the right to assisted suicide might be protected as a liberty interest under the Fourteenth Amendment's Due Process Clause.<sup>48</sup> In *Quill*, the issue was framed as whether allowing one group of terminally-ill patients, those on life support, to opt-out of treatment while not granting others a physician's assistance to end their lives, violated the Fourteenth Amendment's Equal Protection Clause.<sup>49</sup> In treating these two cases together, and suggesting a fairly moderate level of abstraction, a strategy emerges for how the Court will decide future cases in this area. In *Glucksberg*, the Court held that no general right to assisted suicide existed. However, in *Quill*, the Court sought to limit the breadth of that decision by allowing people to opt-out of prolonged life-sustaining treatments.

When the Court adopted "assisted suicide" as its characterization of the physician's actions in *Glucksberg*, it no doubt believed that it effectively closed the door to a due process challenge because the implied right to suicide is not a "time-honored tradition." Nevertheless,

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46. Indeed, strict adherence to political views may play a role, but only at the point where the legal system can no longer operate independent of a broader theory of political morality if justice is to be served. See VINCENT J. SAMAR, JUSTIFYING JUDGMENT: PRACTICING LAW AND PHILOSOPHY 61-89 (1998).

47. See Roger S. Magnusson, *The Sanctity of Life and the Right to Die: Social Jurisprudential Aspects of the Euthanasia Debate in Australia and the United States*, 6 PAC. RIM L. & POL'Y J. 1, 81 (1997).

48. *Glucksberg*, 521 U.S. at 705-06.

49. *Quill*, 521 U.S. at 796-97.

as I will argue, an effective due process challenge remains a possibility if the correct moral analysis is utilized. Even accepting what the Court may have hoped, that the method of a due process challenge was finally put to rest, an alternative approach remains open to protect the right to die via an equal protection challenge, as was done in *Quill*.

The challenge in *Quill* required a showing that New York had either unfairly discriminated against those who sought physician-assistance to end their lives because it allowed others to withdraw life sustaining services, or a showing that the state's prohibition of such assistance was irrational. However, the Court did not address the fact that others could withdraw life sustaining services in *Quill*, and found New York's prohibition to be rational. Thus, the Court was able to set aside the equal protection argument, at least for the time being.

In *Glucksberg* and *Quill*, the Court held that if the option to withdraw life-sustaining treatment remains, other forms of so-called mercy killings could be prohibited. However, this rationale gives rise to the deeper moral question of why the opt-out provision is constitutionally protected while active euthanasia does not receive such protection. Obviously, this analysis is not the only plausible interpretation of *Glucksberg* and *Quill*. Other interpretations from different perspectives could also be advanced. However, the majority of these interpretations would not be as closely related to the actual doctrine that the Court claimed to be applying, that there was no constitutional right to physician-assisted suicide. Consequently, this article's interpretation is valuable because it allows one to morally assess the reasons that the Court claimed to be using when it chose the characterizations of assisted suicide and withdrawal of life-sustaining treatment.

Evaluating *Glucksberg* and *Quill* together suggests the possibility that the right to die is not a fundamental constitutional right. Under the interpretation I have suggested, these two cases represent factual situations where such a right would not control, even though the state was not required to show a compelling interest for why the right should be overridden.<sup>50</sup> Thus, implicit in these two cases is the Court's intention to limit, at least for the time being, the scope and protection of any due process or equal protection challenge to state

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50. The point here is that a right may be valid even when it is overridden, that is when it is justifiably infringed because "there is sufficient justification for not carrying out the correlative duty." Alan Gewirth, *Are There Any Absolute Rights*, in *HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATION* 219 (1982).

laws prohibiting physician-assisted suicide.<sup>51</sup> Under such an interpretation, if the right to physician-assisted suicide exists, it is only when necessary to offset great pain and suffering.<sup>52</sup> This interpretation is different from a more general right to physician-assisted suicide, even when considered under the rubric of the right to privacy. The degree of generality, as evidenced by the particular interpretation adopted, is crucial to the way these cases are resolved. Accordingly, the degree of generality in the Court's characterizations of these cases is directly related to the strategy on how these cases were decided by the Court. Nevertheless, the remaining question is if the Court was morally justified in deciding these cases in such a manner that a system of constitutional government could legitimately affirm the decisions.

### III. THE META-PRINCIPLES BY WHICH COURTS DECIDE CASES

I propose that courts should, and often do, decide cases which fit a three-tiered model, especially where constitutional rights are involved.<sup>53</sup> The first tier is the decision itself and accompanying positive law.<sup>54</sup> In many cases, the first tier is adequate to decide the matter because the principles are not in controversy, and the question is strictly one of determining the relevant facts. However, on occasion the positive law, either on its face or as applied, is inconsistent or appears unjust.<sup>55</sup> As a result, courts must then appeal to a second tier.

In the case of constitutional principles, for example, the need to appeal to a second tier may arise because a constitutional provision is interpreted too narrowly, and thus ignores other constitutional interests.<sup>56</sup> An appeal to a higher-ordered principle, as a way of adjudicating between the competing interests at stake, is necessary if the law is to provide a duty that each of us should obey, rather than becoming a coercive impetus to action. At the second tier, courts may attempt to determine what the law is according to what best fits the political morality of the society.<sup>57</sup> In reference to the second tier, I place Ronald

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51. The scope of a right includes the cases that lie within its boundaries or its area of coverage. The protection of a right is its strength, whether it prevails against opposing interests that may also fall within its boundaries. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 131 (1982).

52. See *supra* notes 28, 31, 32, 33, 36, and *infra* note 98, and accompanying text.

53. See *SAMAR supra* note 46, at 76-77 (discussing criteria for when a judge should decide a case based on conventional sources, when she should appeal to the society's political morality, and when she should appeal to a system of natural law/natural rights).

54. See *id.* at 76, nn. 1 & 2.

55. See *id.* at 76-77, nn. 3 & 4.

56. See *e.g. id.* at 140-47 (discussing *Bowers v. Hardwick*, 478 U.S. 186 (1986), as rendering too narrow an interpretation of the constitutional right to privacy).

57. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 143-44 (1985).

Dworkin's approach of deciding what the law is by framing the question as one of choosing the best constructive interpretation of our legal practice.<sup>58</sup> However, even at this second tier, society's political morality may not be clear, as was the case when the Court decided *Dred Scott v. Sanford*.<sup>59</sup> For this reason, a court may need to appeal to a third tier of natural law/natural rights in order to decide a case where society's morality is not fixed.<sup>60</sup>

In *Quill*, the positive law was inconsistent insofar as New York allowed the withdrawal of life-sustaining treatment, but did not allow assisted suicide. As I will argue below, there may be no morally significant difference between the two approaches. The inconsistency of New York's action in *Quill* is buttressed by the fact that under the American Medical Association's (AMA) practice, a physician is allowed to provide terminal sedation to a patient in order to alleviate pain while fully knowing that the medication will hasten death.<sup>61</sup> This

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58. RONALD DWORKIN, *LAW'S EMPIRE* 225 (1986).

59. The *Dred Scott* case involved the question of whether the Constitution allowed Congress to require northern states to return escaped slaves back to their southern masters under the federal Fugitive Slave Act. The Court held that it did. See *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). The decision is now considered to be effectively overruled by passage of the Reconstruction Amendments, specifically, the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.

60. See SAMAR *supra* note 46. In *Dred Scott*, the Court might have appealed to a third level of natural law/natural rights to resolve the issue. Actually, given the widely held but divergent viewpoints on the American Negro slave at the time of the *Dred Scott* decision, it is not clear what result the Court might have reached had it chosen to follow that analysis. This demonstrates that even when one appeals to a higher-ordered political morality, social viewpoints may still dominate. One may hope that at the higher levels, criteria might be provided by the theory itself (such as what it means to be an agent) to help offset such biases. Nevertheless, in *Dred Scott*, the Court disposed of the matter without such an appeal, making the case one of its most notorious decisions.

Apparently, the Court felt that it could not leave the matter to the individual states because that might lead to civil war. Nor was the Court's own solution to uphold the federal statute justified in the minds of many commentators given that slavery would continue. If the Court sought a solution at the third tier, it would have been concerned with what would be the best overall theory of political morality to follow rather than how to best construct a legal practice that had, up to this point, included slavery. The argument in favor of rejecting the second tier is not that the best construction would include slavery, but that it might include majoritarian practices that would have delayed its removal.

Nevertheless, not following such a second tier approach would have meant taking a position in favor of a potential civil war, which the Court was not prepared to do. The Court would have had to figure out whose rights were legitimate and the scope of its obligation to protect those rights. A higher-ordered principle might have provided this understanding. However, in *Dred Scott*, the Court refused to take this higher road, which ironically only delayed the war that perhaps was inevitable. See *id.* at 147-52 (citing Ronald Dworkin, "The Law of the Slave-Catchco: A Review of Robert M. Clover's *Justice Accused: Antislavery and the Judicial Process*," *TIMES LIT. SUPPL.*, December 5, 1975, at 1437).

61. See *Quill*, 521 U.S. at 809 (referring to Justice Stevens' concurring opinion in *Glucksberg*, 521 U.S. at 751).



policy suggests that in *Quill* there was a need to go beyond the first tier of analysis and determine whether the New York practice afforded equal protection under the law.

Two questions dominate at each tier. The first question is conceptual and asks how to characterize the issues in the case. Clearly, the characterization of the issues often determines how a case will be decided, as was done in *Glucksberg* and *Quill*.<sup>62</sup> In both *Glucksberg* and *Quill*, the Supreme Court chose to characterize the basic issue as whether the Constitution protects physician-assisted suicide, as opposed to whether it protects an individual's right to die.<sup>63</sup> Presumably, the Court's choice in these cases was an effort to avoid making a decision that was broader than necessary to resolve the issues. When the Court made its choice, the net effect was to invoke a set of constitutional norms that not only determined the outcome, but may have repercussions in the future.

A second question asks what justifies a particular outcome in a case as being correct. The answer to this question depends on how we have resolved the normative question at the next highest level. An outcome at one level is justified by appealing to a norm at the next highest level thought to be justified. For example, a right to die may be justified as an instance of either a more general due process right to privacy or liberty, assuming that these values can provide a basis for more particular rights.<sup>64</sup> The right to die could also be justified as an aspect of equal protection of the laws if death is allowed in some situations but not others.<sup>65</sup> In this situation, equal protection would thus be derivative of a prior due process determination: that a fundamental right was involved. However, not all agree.<sup>66</sup> For example, a general right to commit suicide would not be justified as an instance of privacy or liberty if the state had a compelling interest to protect otherwise healthy individuals from momentary psychological impulses that lead to their own deaths.<sup>67</sup> The question of what standards apply may not arise if the prohibition against suicide is generally thought to

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62. *Id.* at 812-13.

63. *Glucksberg*, 521 U.S. at 705-06.

64. See SAMAR, *supra* note 19, at 196-203; see also *Glucksberg*, 521 U.S. at 793 (Stevens, concurring).

65. I am relying on the idea that equal protection places a higher standard on a party's claim when a fundamental right is involved. See TRIBE, *supra* note 29, at 1454.

66. See e.g., Cass K. Sunstein, *The Right to Die*, 106 YALE L. J. 1123, 1161 (1997).

67. It may be argued that I am assuming a compelling justification for restrictions on suicide the Court never stated was required. Therefore, how do I reconcile that fact with the idea that there are higher levels of abstraction? Moreover, even if it were the Court's view that laws against suicide generally are supported by a compelling state interest, why, in the cases of physician-assisted suicide, did the Court fail to discuss the states' justifications in this way?

subsume the issue in *Glucksberg* and *Quill*. In that situation, it may simply be enough to suggest that the right to die is contrary to a long-standing tradition of our law prohibiting suicide or assisted suicide. These two cases, along with *Cruzan* and *In Re Quinlan*,<sup>68</sup> are the most difficult types of cases for the courts because they fall between clear instances of suicide and the broader rights to liberty and privacy. Such cases push us in a direction toward re-evaluating issues not previously thought to be in question.

For any justification to succeed, there must be some higher norm that is thought, at least tentatively, to be justified.<sup>69</sup> Nevertheless, that higher normative principle may also be called into question. When this occurs, the Court will face conceptual questions of what the principle means, what its scope and content is, and what norm justifies the principle.<sup>70</sup> At each level of analysis, we may also find it necessary to appeal to some principle of constitutional interpretation, which may eventually take us to the point where what we appeal to is not part of

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My answer has two parts. First, the fact that the Court assumed suicide in general to be against our tradition says nothing as to whether that view was supported by a compelling state interest or some lesser standard. The Court simply stated that even though "many of the rights and liberties protected by the Due Process Clause sound in personal autonomy [that] does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . ." *Glucksberg*, 521 U.S. at 721. Thus, it is unclear if the Court thought that suicide in general was outside the realm of privacy and liberty, or if it simply saw no reason to reach that higher issue in these cases.

As for the second objection, the reason the Court did not characterize physician-assisted suicide as requiring a compelling state interest was because given the facial claims against the statutes that were before the Court. The Court did not see a factual basis to treat physician-assisted suicide as any different from other forms of assisted suicide. Therefore, if restrictions on other forms of assisted suicide were thought justified on the basis of whatever standard the Court thought appropriate, physician-assisted suicide must be treated similarly.

In saying all this, I have adopted a kind of external viewpoint that presupposes that restrictions on suicide in general are justifiable as a compelling state interest, which are discussed *infra*. Judges, speaking from an internal point of view, however, do not go this far. It is enough for them that the issue of suicide in general can be prohibited and that physician-assisted suicide is just another form of suicide. The fact that compelling state interest language was not used in these cases should not appear all that surprising.

68. *Cruzan*, involved the question of whether parents and co-guardians could order the withdrawal of life-sustaining treatment from their twenty-five year old daughter after she sustained severe injuries resulting in a loss of cognitive faculties and had no possibility of recovery. Treating the matter as involving a fundamental liberty interest rather than a general privacy right under the Fourteenth Amendment, the Court, under the lesser standard of protection that applies in due process cases, allowed the State of Missouri to continue life-sustaining treatment. 467 U.S. at 281-82. In *In re Quinlan*, 355 A. 2d 647 (N.J. 1976), *cert. denied*, 429 U.S. 922 (1976), the patient's father sought a court order allowing him to disconnect a respirator so she could die quickly. The Supreme Court of New Jersey granted the father's request on the ground that the individual's right to privacy grows as the degree of bodily intrusion increases. *Id.* at 664.

69. See Delf Buchwald, *Essay! Statutory Interpretation in the Focus of Legal Justification: An Essay in Coherentist Hermeneutics*, 25 TOL. L. REV. 735, 744-50 (1994).

70. See *id.* at 750-51.

the Constitution, but gives rise to its moral legitimacy.<sup>71</sup> Thus, each stage of the analysis must rely on the norm adopted at the next highest stage for its justification, until we reach a level where it is no longer useful to raise a question, or until we have reached the highest level where correspondence truth collapses into coherence truth.<sup>72</sup>

If everything was clear, and no issue of justification was at stake, there would be no need to appeal to higher levels. In *Glucksberg* and *Quill*, this was not the case. The Court failed to give a full account for why the right to die would not include physician-assisted suicide, under what circumstances such assistance might be allowed, or even whether a right to die existed.<sup>73</sup>

Typically, the way we initially frame the conceptual question in a case determines how far up the ladder of abstraction we go to solve the normative question. Where a case appears to ask a fairly narrow question, it is usually unnecessary for a court to appeal far up the ladder of abstraction to decide the normative issue. This was the purported situation in *Glucksberg* and *Quill*. However, even in these scenarios the Court recognized that in a subsequent case, there may be a very different set of facts. In such a situation, a court may begin with the most concrete level where the decision can be rendered, and then, if necessary to avoid inconsistency or injustice, move to more abstract levels in order to resolve other issues that may arise. This proposition relies on the assumption that we take our legal system to be morally justified.<sup>74</sup> This analysis also relies on the assumption that courts are most legitimate when they decide cases based on the narrowest interpretation of the law that the institutional practice makes available.

This internal point of view suggests that the Court's holding in *Glucksberg* and *Quill* may have been motivated by its desire to protect its own legitimacy. In *Glucksberg* and *Quill*, the issue was not whether a particular set of claimants had adequate pain relief to alleviate suffering available to them, or whether they had a specific rational reason to choose death, given the state of their current health.<sup>75</sup> Rather, the issue was whether the statute on its face was unconstitutional.<sup>76</sup> In this context, the decisions that the Court rendered may

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71. See SAMAR, *supra* note 46, at 30-60.

72. See SAMAR, *supra* note 46, at 223.

73. Fred R. Farzino, *Undue Economic Influence on Physician-Assisted Suicide*, 1 DEPAUL HEALTH CARE L. 537, 550-516 (1996) (giving particular emphasis to the failure to consider economic concerns).

74. See SAMAR, *supra* note 46, at 73.

75. This is made clear by Justice O'Connor's concurring opinion. See *Glucksberg*, 521 U.S. at 736-37 (O'Connor, J., concurring).

76. *Glucksberg*, 521 U.S. at 708-09; see *Quill*, 521 U.S. at 797-98.

have been all that it felt politically able to accomplish in order to avoid an appearance of overstepping efforts that were being made at state legislative levels. In this sense, characterizing such cases as instances of suicide serves to prevent undeveloped ideological positions from eclipsing the rational search for truth that courts should attempt to perform.<sup>77</sup>

In *Glucksberg* and *Quill*, the state laws in question did not deprive terminally-ill patients of pain-relieving drugs that may hasten death, or the patient's right to withdraw from life-sustaining treatment, thereby allowing the narrower characterization to succeed.<sup>78</sup> As indicated in the concurring opinions in *Glucksberg* and *Quill*, it was the specific facts that persuaded several Justices to join in the result, on the condition that the decisions be rendered at the lowest level of abstraction.<sup>79</sup> Since a facial challenge normally involves a higher level of abstraction, the concurring Justices may have been concerned that if a restriction was not placed on the holding, the precedent established by the majority would be too restrictive on future cases. This concern is typical of the Court's judicially conservative philosophy to not render a decision that may be too broad under a different factual situation. Note that conservative in this context is defined as not making a broader decision than is necessary to decide the cases. In the concurring opinions, the ultimate result desired may have been more liberal than the decisions that were actually rendered.

Conversely, if the withdrawal of life-sustaining treatment was not allowed, a decision to appeal to a higher-level principle might have been forced. This fact is especially true if the patients were alive and either in acute pain or drugged into a state of senselessness. In such

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77. Elsewhere, I have called the decision to take carefully measured steps up the ladder of abstraction "epistemic pragmatism," reflecting the view that courts are supposed to be engaged in a search for knowledge but are at the same time limited in just how far they can go in that search by their own need to maintain legitimacy along the way. I am not suggesting that my view of the way courts operate is universally accepted. Critical legal studies theorists, for example, see the operation of courts as often preserving the dominant political force in society. See RAYMOND BELLIOU, *JUSTIFYING LAW: THE DEBATE OVER FOUNDATIONS, GOALS AND METHODS* 162 (1992). Critical race theorists see the function as supporting racial domination. See, e.g., Derrick Bell, *Radical Racism*, 24 CONN. L. REV. 363, 376 (1992). Some feminists see it as recreating gender divisions. See PATRICIA WILLIAMS, *Feminist Legal Critics: The Reluctant Radicals*, in *RADICAL PHILOSOPHY OF LAW: CONTEMPORARY CHALLENGES TO MAINSTREAM LEGAL THEORY AND PRACTICE* 78 (David S. Caudill & Steven J. Gold eds. 1995); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 4-5 (1987). My argument here is based solely on what I see as the only morally legitimate function for courts. See SAMAR, *supra* note 46, at 110-37.

78. *Glucksberg*, 521 U.S. at 736-37.

79. *Glucksberg*, 521 U.S. at 702 (O'Connor, J., concurring); *id.* at 780 (Souter, J., concurring); *id.* at 791 (Breyer, J., concurring); *id.* at 745 (Stevens, J., concurring).

instances, the higher-level principle may have been the ground for a more liberal result than that actually rendered in *Glucksberg* and *Quill*.<sup>80</sup>

In all right to die cases, courts need to be circumspect when appealing to a higher-ordered principle in order to interpret equal protection, due process, or whatever constitutional provision might be involved, if they are to avoid idiosyncratic decisions and preserve their own legitimacy. In these physician-assisted suicide cases, the Court seemed most aware of this requirement.<sup>81</sup> The Justices went out of their way to state that the level of abstraction chosen to resolve these particular issues may be different from the level that may be utilized in future cases with materially different facts.<sup>82</sup>

#### IV. WHY THESE HOLDINGS REMAIN OPEN

Next, this article discusses a possible rationale behind the precedential effect of *Glucksberg* and *Quill* in terms of why the Court believed it was important to keep future decisions regarding the right to die open. I do not intend to treat the issue politically in terms of the possible intentions of individual Justices. Rather, I intend to look at the Court's decisions, including the various concurring opinions, as a rational unity that needs to be unpacked along the lines that I have already suggested. However, I also intend to go beyond mere appeals into interpretative principles in order to show the underlying uncertainties that the Justices believed would have to be resolved before a fuller decision could be rendered.

As indicated in the concurring opinions, and in footnote 24 of the Court's majority opinion, the Justices acknowledged that they did not intend to foreclose all future claims that may arise in right to die cases.<sup>83</sup> An example of such a situation is when the Court must rule on the constitutionality of a statute that specifically recognizes a lim-

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80. Bruce Ackerman's analysis of the Equal Protection Clause seems equally appropriate here. He noted that history plays a role in equal protection analysis by bringing into relief the deeper meanings behind the terms the Framers provided. As the specific context in which the amendment was adopted recedes into the background, its own broad language comes into better focus and thus, its provisions become more generalizable to new situations. See BRUCE ACKERMAN, *I WE THE PEOPLE: FOUNDATIONS* 94-99 (1991).

81. Chief Justice Rehnquist discussed the need to not preclude democratic debate on the issue. *Glucksberg*, 521 U.S. at 735-36. Justice O'Connor spoke about these very [illegible] legal barriers to [illegible] medication. *Id.* at 736-37. Justice Stevens emphasized the "categorical" nature of the facial challenge. *Id.* at 741-42. Justice Souter expressed concern that the State's claim could not be adequately confined. *Id.*

82. See *id.* at 735, n.24.

83. *Id.*; see also *id.* at 736-37 (O'Connor, J., concurring); *id.* at 790-91 (Breyer, J., concurring) (both emphasizing that the law before the Court did not require patients to be in severe pain).

ited right to die.<sup>84</sup> The Court did seem to believe, however, that the fundamental autonomy interests of all people, as a matter of both constitutional and moral principle, can be more precisely defined by a set of institutionally regulated policies. Such policies might be adopted as legislative solutions to the problems of undue influence or coercion. Moreover, if such a statute did not open a broader fundamental rights objection, a principle of deference and not just autonomy may support a decision to uphold the statute. However, such a decision would not occur in a situation where a state tried to limit the use of pain-killers and sedatives that hasten death. Since such a limitation can cause unnecessary pain and suffering to someone who will die anyway, the Court might find the statute to impose an unwarranted intrusion on patient choice or the doctor-patient relationship.<sup>85</sup>

As applied to either situation, the *Glucksberg* and *Quill* opinions seem open to the possibility that there may be some legitimate scope for a patient to claim a right to die. From a practical point of view, a lawyer representing a client may want to look for such a fact pattern. However, the analysis does not stop there. To state that an issue remains open does not indicate at this point how a different case might be decided, let alone how it ought to be decided. Doctrine becomes important and the Court's decisions in these cases might be seen as mere instances of a broader constitutional/moral viewpoint.

Justice Stevens argued that the majority partially suggested a method of looking at these decisions, while at the same time suggesting a deeper concern: a physician's ability to alleviate human suffering. His particular approach to the distinction between giving a lethal injection and the withdrawal of life-sustaining treatment parallels a long standing debate among moral philosophers.<sup>86</sup>

In *Euthanasia, Killing and Letting Die*, James Rachels characterizes the position of the AMA as one of permitting passive, although not active, euthanasia. The AMA House of Delegates statement provides as follows: "The intentional termination of the life of one human being by another—mercy killing—is contrary to that for which the medical profession stands and is contrary to the policy of the AMA."

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84. Oregon has such a statute, which has been a hotbed of political debate at the national level. *Right to Die Hangs in the Balance with New Legislation; U.S. Government to Play God and Decide Who Will Die and When*, BUS. NEWS WIRE, November 4, 1999.

85. This seems to be Justice Breyer's point in saying that the Court need not decide now, if a right to die "is fundamental under the Constitution." *Glucksberg*, 521 U.S. at 791 (Breyer, J., concurring).

86. RACHELS, *supra* note 22, at 153-55. But see STEINBOCK, *supra* note 22, at 159-64. On the question of causation, see the example cited in H. L. A. HART & A. M. HONORÉ, CAUSATION IN THE LAW 72 (1959).

The policy also prevents involuntary passive euthanasia.

The cessation of the employment of extraordinary means to prolong the life of the body when there is irrefutable evidence that biological death is imminent is the decision of the patient and/or his immediate family. The advice and judgment of the physician should be freely available to the patient and/or his immediate family.<sup>87</sup>

According to Rachels, the flaw in the AMA's position is that it "den[ies] that the cessation of treatment *is* the intentional termination of life."<sup>88</sup> When a doctor, following the provisions stated by the AMA, determines that it is in her patient's best interests to discontinue treatment, decides not to perform a life-saving surgery, or instructs the nurses to withhold medication, she is intentionally terminating the life of the patient with no significant moral difference than if she actually gave the patient a lethal injection.<sup>89</sup> If there is a significant moral difference, it is in favor of supporting the patient's interests by avoiding further unnecessary suffering that would accompany a prolonged death caused by the cessation of treatment. As Rachels notes, we would not allow the distinction between passive and active taking of a life to exonerate or even lessen the moral culpability of one who stood idly by watching a child drown in a bathtub, even though the bystander did not force the child's head below the waterline.<sup>90</sup> If this proposition is true, one must then ask why in terminally-ill cases we allow such a distinction to legally exonerate the medical profession in terminating treatment, but not in giving a lethal injection. Either both forms of euthanasia are wrong, or they are not. As a result, we must look at the justification for euthanasia itself.

In *The Intentional Termination of Life*, Bonnie Steinbock takes a different view from Rachels with respect to the position of the AMA. According to Steinbock, the AMA statement does not imply support of the passive/active distinction because allowing "the cessation of the employment of extraordinary means" to prolong life is not necessarily

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87. Approved by the House of Delegates of the AMA on December 4, 1973 and cited in RACHELS, *supra* note 22, at 152.

88. RACHELS, *supra* note 22, at 155.

89. *Id.* at 153-54. Cf. Yale Kamisar in his most recent discussion of *THE RIGHT TO DIE*, *supra* note 43, at 516-17.

90. RACHELS, *supra* note 22, at 156. The notion that the two are morally different is based on the idea that the person who holds the child's head under water is willing to act evilly, and therefore, is more dangerous. While this concern may be a justification for greater punishment as a way to deter such behavior, on its face it does not make the behavior any the more evil than one who passively allows the child to die without offering the least assistance in a context where there would be no comparable cost to the rescuer.

the same as intending to take that life.<sup>91</sup> The difference is that the right to refuse treatment can be viewed as protecting patient privacy from unwanted intrusions by others; it is not to give patients the right to die.<sup>92</sup> Moreover, "the point of discontinuing treatment is not to bring about the patient's death but to avoid treatment that will cause more discomfort than the [underlying illness] and has little hope of benefiting the patient."<sup>93</sup> An analogous argument can be made for the distinction between giving ordinary and extraordinary treatment where the latter involves efforts to keep the patient alive, despite impending death. The distinction is too situational because it is based on the physician's intent not to inflict pain without reasonable hope of a cure or remission of the disease.<sup>94</sup> Once such treatment is withdrawn, however, it will still not always be in the patient's best interest to receive a quick death as opposed to a death supported by the comfort and love of her family and friends.

Obviously, both sides can muster arguments to support their positions. At the level of the proffered arguments, it is not clear that either one is mistaken. We have no way to ascertain exactly what is mentally intended when euthanasia occurs. If it is true to say that one intends the natural outcomes of one's actions, which in these cases is death, then it is also true to say that death is intended when one believes they are alleviating pain and suffering by withdrawal of life-sustaining treatment. Thus, the debate continues without resolution because the characterizations adopted by both sides evade, rather than answer, the underlying issue of whether, and under what circumstances, a person has a right to die.<sup>95</sup> In short, the issue has no easy answer.

Perhaps for this reason, the comments in several of the Justices' opinions in *Glucksberg*, and footnote 24 of *Quill*, recognize the need to keep the level of abstraction open so a future case may produce a different result.<sup>96</sup> The reason these comments did not go further to-

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91. STEINBOCK, *supra* note 86, at 160; see also Giles R. Scofield, *Exposing Some Myths about Physician-Assisted Suicide*, 18 SEATTLE U. L. REV. 475, 478 (1995) (arguing that the two rights are not the same).

92. See STEINBOCK, *supra* note 75, at 160.

93. *Id.* at 161-62.

94. See *id.* at 162.

95. The Court itself acknowledges that "Our holding permits this [national debate over the right to die] to continue." *Glucksberg*, 521 U.S. at 735.

96. Justice Stevens' point that a more particularized challenge in a future case might succeed suggests that the Court will have to reassess the situation differently. *Glucksberg*, 521 U.S. at 750 (Stevens, J., concurring). Justice Breyer's point that we need not now decide whether a right to die is fundamental suggests a higher level of abstraction might be employed in the future. *Id.* at 791 (Breyer, J., concurring).



ward recognizing a right to die at this time was because the Justices believed that the facts of these two cases did not warrant such a recognition.<sup>97</sup> The Justices were also wary of making a constitutional ruling broader than was needed to resolve the issue in each case.<sup>98</sup> Additionally, the Justices wanted to give deference to legislatures who are in a position to set up task forces that can best determine ways to protect physician ethics and ensure the avoidance of coercion and stereotyping of the terminally ill.<sup>99</sup> Courts often avoid making constitutional pronouncements in areas where different facts in future cases may suggest a different interpretation.<sup>100</sup> Courts are uncertain as to the long-term solution and do not want to limit their options for the future.<sup>101</sup> This may explain why in both *Glucksberg* and *Quill*, several of the Justices wrote as if they preferred that the various states' legislatures first draft the statutes based on relevant fact-findings which a court might later review. The Justices' concurring opinions certainly suggested that further legislation in this area would not only be welcomed, but was an important part of the democratic process.<sup>102</sup> Reluctance to decide constitutional questions too quickly may also explain why a communitarian approach often precedes a move to discussion regarding fundamental rights.

Nevertheless, there remains a difficulty with the Court's failure to go further in its analysis of the right to die in *Glucksberg* and *Quill*. That difficulty concerns a future court's directions as to how this area of law should evolve. For this reason, we must go further than merely explaining what the Court failed to do in each of these cases. We must explain what the Court should do in a future set of cases. For example, we must illustrate under what circumstances the facts that may have influenced Justice O'Connor to join the majority are not present. However, this means that we must be prepared to present a consistent theory of political morality regarding how such cases ought to be decided in the future.<sup>103</sup>

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97. As indicated, several of the Justices took note of the fact that no patient was being denied pain medication even if it hastened death.

98. Justice Rehnquist's majority opinion did not want to cut off debate. *Glucksberg*, 521 U.S. at 535. Justice Souter emphasized the legislature had not acted arbitrarily and had a superior ability to obtain facts. *Id.* at 786-88 (Souter, J., concurring).

99. *Id.* at 788 (Souter, J., concurring); *id.* at 737 (O'Connor, concurring).

100. See SUNSTEIN, *supra* note 4, at xi-xiii.

101. This seems implied by several of the Justices' comments suggesting a possibly different result in a more particularized case in the future.

102. *Glucksberg*, 521 U.S. at 788 (Souter, J., concurring).

103. I focus here on political morality because this is a fundamental rights question which has not previously been well-defined or accepted.

## V. THEORETICAL CONCERNS

As a prologue to specifying a theory that would presumably provide both scope and justification for a right to die, I shall address two questions. The first question asks what it means to have a right in general. The second question concerns how rights are justified. This second question is related to the level of abstraction a court may adopt to discuss a topic. In the next section, I will specify how these levels of abstraction are related specifically to the right to die. Initially, I treat these two questions of meaning and justification separately because I believe part of the difficulty in understanding the Court's recent position on the right to die is the tendency to conflate the analyses appropriate to these two distinct issues.

In most cases where there is substantial law addressed to a subject, the resolution of these two issues will be readily apparent.<sup>104</sup> In such cases, stare decisis will usually govern. However, since the *Glucksberg* and *Quill* holdings were the Supreme Court's first real attempt to address the right to die,<sup>105</sup> precedent did not directly apply. Therefore, the exact separation of these two issues, along with how that separation might affect future cases, is not readily apparent.

There is no case to tell us what the right to die means or how it is justified. One reading of the Court's holdings in *Glucksberg* and *Quill* suggests that there may be no right to die. If such a right did exist, the Court could not decide that prohibiting a doctor from assisting in securing its application was constitutional. However, the language of the various concurring opinions suggests the contrary; that the right to die may exist and might be illustrated in other factual situations. Again, how do we decide which of these two seemingly contradictory interpretations is the correct one?

One opinion suggests that the right exists while another claims it does not. Looking ahead to the next section, I believe attempting to understand the logic of rights and how that logic is applied in court cases will be quite helpful. There is probably something in the way which courts only slowly unravel rights to decide cases that put us on

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104. See SAMAR, *supra* note 46, at 118; see also Ronald Dworkin, *Hard Cases* 88 HARV. L. REV. 1057, 1082-1087 (1975), *No Right Answer?*, 53 N.Y.U. L. REV. 1, 2-3 (1978).

105. I distinguish the present cases from *Cruzan*, where the Court decided the issue of whether parents and a guardian had a right to seek withdrawal of a feeding tube from a patient in a persistent vegetative state, not whether a lethal injection could be given. In *Cruzan*, the Court treated the liberty issue as involving a lesser standard of protection associated with a due process interest, rather than a fundamental right to privacy interest. As a result, while it was willing to uphold some protection for a right to withdrawal a feeding tube provided it was in keeping with what the patient would want, the Court was also willing to allow the states leeway in deciding the standard of evidence to be used to make that determination. 467 U.S. at 281-82.

the horns of this dilemma in the first place. However, this means understanding why courts feel it is necessary to make a narrower decision than might be made, for example, by a political philosopher.

In contrast to a court, a political philosopher seeks to justify the legal system as a whole, even if the net effect of a decision may create an overly broad interpretation of the law. Following the latter approach may be valuable if it means setting forth the conditions and background moral doctrines that might persuade a future court to adopt a different result to meet the needs of different factual situations.

Regarding the first question of what it means to have a right, I note that a right in the strict sense is a valid claim against some person or group. The claim is valid if it is supported by some principle or reason that cannot be morally discounted.<sup>106</sup> For example, if the principle is that a person should do no harm, then a right not to be killed or physically or mentally assaulted would certainly fall under this principle.<sup>107</sup> The principle, in turn, is merely a particular value instance of a norm that provides a ground for deciding a set of conceptually related ques-

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106. See Alan Gewirth, *The Basis and Content of Human Rights*, 13 GA L. REV. 1143, 1147 (1979).

107. Here, I follow Alan Gewirth, who states that a right is a valid claim that fits the following paradigm: *A* has a right to *X* against *B* by virtue of *Y*. See GEWIRTH, *supra* note 50. In this paradigm, *A* is the subject of the right, *X* is the object, *B* is the respondent, and *Y* is the reason or justification for the right. *Id.* As indicated, *Y* will always be a principle that justifies the right. In addition to the above elements, one might specify the institutional setting—law, ethics, etiquette—in which the right occurs as well as the nature of the right involved. The latter goes to what we mean when we use the term “right” since not all uses are the same. For instance, if the use is meant to invoke a claim right, such as a contract right or a right not to be harmed, then there will be a correlative duty falling either on a single individual or on the general public depending on the particularity of the transaction that brings it about. WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 36 (1946). If the duty is personal—in *persona*—the transaction will be specific, as the making of a contract to which each party will have a duty only to the other. If the duty is general—in *rem*—the transaction will be universal as in the areas of tort and criminal law where we have decided that each person has a duty to everyone else in society. *The Cambridge Dictionary of Philosophy*, (2nd ed. Robert Audi ed., 1995). If the use is meant to invoke a liberty, such as the right to pick up ten dollars lying in the gutter, then no correlative duty exists. *Id.* No one is obligated to assist another in retrieving the ten dollars nor to refrain from picking it up themselves. If the use is to refer to a power, such as Congress’ power to make laws, then all who are in the United States are liable to obey those laws. It is important to remember that some have thought that the justification for Congress, or any legislature, having such a power may arise from either an explicit agreement, as was true when the Federal Constitution was adopted, or by way of an implied social contract created by residing within the territory. See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* nos. 95, 119 (C. B. Macpherson ed. Hackett 1980). Finally, if the use is meant to invoke an immunity, such as the Fifth Amendment’s immunity against governmental incrimination, then the states are prohibited from forcing one to sign a confession. *Id.* As my concern in this essay is with the right to die as both a claim right and a liberty, I will restrict myself to just these forms.

tions involving how one ought to act.<sup>108</sup> The norm might concern liberty, privacy, justice, or basic well-being. From an internal point of view, the perspective of the person who takes the legal system to be just, the norm will be a standard, model, or pattern adopted by the society to answer these questions of value. Whatever the norm, the question of whether it needs a more exacting justification will depend on whether the values it is taken to support are themselves in question. If the values are in question, the controversy may be resolved by proposing an idealized choice situation in which all the parties can agree to at least a tentative resolution of what the norm encompasses, as suggested in the writings of John Rawls.<sup>109</sup> The norm could also be justified as being derived from a universal principle that all persons qua agents must rationally accept on pain of contradiction, as argued by Alan Gewirth.<sup>110</sup> However the norm is justified, its value to the affected person or group will be determined, at least in part, by the end to which it is directed.<sup>111</sup>

The end may be valued by the group for a limited concrete or abstract reason.<sup>112</sup> Here, too, our second concern regarding justification is applicable. If the reason is concrete, it is directed toward fulfilling the immediate purpose of the person or group which may be a moral or immoral end.<sup>113</sup> If the reason is abstract, it might promote a broad social value such as liberty or autonomy, but it also might not.<sup>114</sup> Rights based on promise keeping provide good examples of ends that

108. SAMAR, *supra* note 14, at 83.

109. See JOHN RAWLS, *A THEORY OF JUSTICE*, 118-92 (1971). See also DERYCK BEYLEVELD & ROGER BROWNSWORD, *LAW AS A MORAL JUDGMENT* (1986).

110. See GEWIRTH, *supra* note 50, at 41-78.

111. See SAMAR, *supra* note 14, at 83. The point here is to suggest a connection between strictly deontological and teleological approaches to our recognition of rights. Under strictly deontological approaches, rights are justified by their pedigree. Under teleological approaches, they must serve some important end. Both approaches are too limited to provide an adequate justification for rights. Deontological approaches tend toward too abstract a notion of rights to protect human well-being. See MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 179-83 (1982). Teleological approaches are too contingent and, even when they are not, as with Aristotle's notion of happiness, they do not provide the certainty that one hopes human rights provide. Immanuel Kant's criticism, although not framed in rights language, of hypothetical imperatives, even those that appear to have a universal end, is applicable. See IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 31-34 (Lewis White Beck trans., Bobbs-Merrill 1959).

112. SAMAR, *supra* note 14, at 83. Norms will often involve both teleological and deontological components. The teleological component concerns the goals to be reached as well as the goods to be obtained. The deontological component concerns questions of justice and fairness, and consent. Justice, for example, illustrates the deontological side while concern for the common good exhibits the teleological side.

113. See SAMAR, *supra* note 14, at 83. I mean to distinguish here self-interest as a basis for rights from a more general moral view.

114. *Id.*

are both particular and general.<sup>115</sup> The end is general in the sense that it promotes the generally accepted value that, all else being equal, giving one's word to another is the same as binding oneself. The end is particular in the sense that one is now bound to the other for a specific purpose.<sup>116</sup> However, an obvious vagary arises when I say "all else being equal" because there may be conditions where the duty to complete one's promise is voided on moral grounds.<sup>117</sup> The end thus would also have to be moral for the promise to command our obedience.<sup>118</sup> Being abstract only guarantees that the end is general with respect to an individual's or group's self-interest, not that it promotes some important aspect of human welfare.

In the law, the ends will be abstract in the sense of being general, but will not always be perceived at the same level of generality. This idea is made evident by the fact that a law which appears questionable at one level of analysis may be morally acceptable at a more abstract level and vice versa. For example, a constitutional interpretation that allows Nazis to march in a community of holocaust survivors may seem immoral, until it is recognized that the very existence of such freedoms in part ensures that human rights are being protected. (This is independent of an evaluation that it is wrong for people to use their rights in this way.) Similarly, a law that supports private transactions, as in the area of contracts, may be justified by principles that fulfill some important social end, such as the promotion of a free market economy, provided that no moral law is violated. However, at even a higher level of abstraction, it might be recognized that some laws which might accomplish this policy or practical purpose would also be immoral.<sup>119</sup> For example, laws that would allow people to contract away their basic rights to freedom and well-being for food and shelter would be immoral. More to the point, a society that does not afford

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115. For a good discussion of the difference between particular and general rights, see H. L. A. HART, *Are There Any Natural Rights?* in *POLITICAL PHILOSOPHY* 53-66 (Anthony Quinton ed. 1967).

116. See generally JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 294-321 (1990),

117. Under such conditions, fulfilling one's promise may violate a more important moral end and thus performing the act may even be immoral. A doctor passing by a serious accident when no other medical help is available in order to be on time to a promised dinner engagement is just one such example.

118. This is an instance of what I earlier explained as the adjectival versus nominative uses of the word "right." We may allow as justified the nominative use of a right in the general case even though the end to which it is put in the particular case we judge to be morally wrong.

119. In *JUSTIFYING JUDGMENT*, I argue that the fundamental mistake with the Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905), was that in upholding freedom of contract, the Court failed to do justice. See SAMAR, *supra* note 46, at 162-71.

alternatives to those persons who find it financially necessary to contract away their rights would be a morally destitute society.

It is also important to distinguish ends that are directly connected to moral rights from those ends that may be connected to policies and practices that sometimes create moral duties. The goals of society, as expressed by its policies or practices, even if moral, do not necessarily create moral rights. For one reason, such policies and practices may not be "personally oriented;" that is, they may not be "requirements owed to distinct subjects or individuals as such for the good of those individuals."<sup>120</sup> Moreover, policies and practices can be morally ambiguous in a way that rights cannot. With respect to rights, a holder of a right has a *prima facie* moral claim until a higher moral principle is found to override that claim. In the case of a policy or practice, as the above free market illustration indicates, one needs a separate moral argument to justify placing an obligation on an individual to support some collective or societal goal. Thus, even the goal to sustain life, when construed as a policy, does not create a moral right unless the goal is brought under a principle that all persons *qua* persons could theoretically agree on and would subsequently possess.<sup>121</sup> Such a principle is required because social goals, even laudatory ones, do not guarantee that the morally legitimate interests of all persons are being given equal concern.<sup>122</sup> Thus, policies and practices only create moral rights when attached to principles like fairness, consent (as in majority rule), justice, or other principles that protect the freedom and well-being of all people.<sup>123</sup> Even then, the violation of a social goal may not necessarily entail a moral wrong. This condition depends upon the harm done to individuals that would likely result from such a violation. Moral duties correlating to moral rights, require that the policies and practices to which they may attach be fair in their treatment of different people; thus, the formal side of morality is represented. However, these same duties and rights must also be significant in promoting the fundamental interests of all people as such, the material

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120. GEWIRTH, *supra* note 50, at 11.

121. See Onora O'Neill, *Reason and Politics in the Kantian Enterprise*, in KANT'S POLITICAL PHILOSOPHY 73-74 (Howard Williams ed., 1992).

122. Ronald Dworkin distinguishes policies from principles. The former reflect goals to be reached like "an improvement in some economic, political or social feature of the community." Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 23 (1967). The latter reflect "a requirement of justice or fairness or some other dimension of morality." *Id.*

123. Here I note that morality addresses the "the most important interests, of persons or recipients other than or in addition to the agent or the speaker." ALAN GEWIRTH, *REASON AND MORALITY* 1 (1978).

side.<sup>124</sup> In those cases where little or no harm is likely to result from violating a policy or practice, only a minor moral infraction exists.

From what has been said, it should now be evident that the claimed right to physician-assisted suicide must be supported by moral principles which courts are obligated to recognize, if it is to be upheld on constitutional grounds. This is the second theoretical question I set out to discuss and the one which the various concurring opinions largely ignored. However, the analysis goes beyond even this question. Courts of law are not in the business of recognizing principles in a random fashion, even moral principles. The case may also be made for opting not to set forth too broad a decision where necessary information is lacking.

Additionally, principles which the courts do adopt should be related to some important end that courts are obligated to secure, and that end must also be a moral end if it is to correlate to a duty that others ought to obey.<sup>125</sup> For example, in physician-assisted suicide cases, the end might be to respect individual autonomy. Courts should recognize this end as essential in itself, and as foundational to achieving a democratic society.<sup>126</sup> Otherwise, we are in the position of a gunman who can issue an order without that order providing more than a self-interested motivation for obedience.<sup>127</sup>

The government's role in recognizing moral principles should be restricted to those circumstances when rights cannot be adequately protected by the individuals who hold these rights. This scenario is likely in cases which involve the right to die. Such a limitation extends from a prudential principle that has moral consequences. That idea is to avoid the creation of an overbearing government that could use its power to restrict rights and privileges.<sup>128</sup> Still, what constitutional

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124. See *APPLYING MORAL THEORIES* 10 (3d ed. C. E. Harris Jr. ed. 1997). H. L. A. Hart also makes use of the distinction between the formal and material sides of morality when he discusses a society that determines who is free and who are slaves according to a formal principle of justice, such as, by treating like cases alike. Here, the problem can be seen in our own history when, for example, many African-Americans were treated as slaves. The theoretical concern that Hart is drawing to our attention is that the criterion we use to determine whether two cases are alike or do not matter. See H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 624 (1958).

125. See *SAMAR*, *supra* note 46, at 30-60.

126. For the argument that autonomy is an end of a democratic society, see *SAMAR*, *supra* note 14, at 88-103; for the argument that it is a value in itself by virtue of being a source for other values, see *id.* at 205-07; see also *GEWIRTH*, *supra* note 123, at 256, and *CHRISTINE M. KORSGAARD*, *THE SOURCES OF NORMATIVITY* 19-20 (1996).

127. Here, I follow the distinction H. L. A. Hart makes between being obliged and having an obligation. See H. L. A. HART, *THE CONCEPT OF LAW* 80 (2nd ed. 1994).

128. Gewirth, for example, notes that government may be necessary to adequately protect human rights. But such government must provide both consent for its decision procedures as

principle might justify a right to die? How might we reach such principles? These are the important and complex questions which I shall address in the next part.

## VI. THE SUBSTANTIVE PRINCIPLE BEHIND THE RIGHT TO DIE

In *Glucksberg* and *Quill*, the Court's doctrinal approach to the right to die was limited in scope. As a result, we must provide criteria for how the Court's approach might be broadened if future cases that challenge the current limitations arise.

If the decision in any new case is to be sound, it cannot simply be based on the whims of the Court. However, the decision also cannot be based on a mere recitation of past or current statutes. Legislative history governing a statute can be important because various legislative committees, as well as the intentions of those involved in crafting the legislation, can be useful in aiding the manner in which a statute should be interpreted.<sup>129</sup>

Nevertheless, in future cases, the Court may have to consider the issue at a higher level of abstraction if the cases pose fundamentally new or serious challenges to basic liberty. More likely than not, such issues will attract attention that is not as easily avoidable as it was in *Glucksberg* and *Quill*. This suggests that a court preparing to engage future cases cannot restrict itself to specific legislative decrees or random political and moral views. The political morality underlying any such attempt would, no doubt, be in question. Additionally, it is not enough to say, under such trying circumstances, that we must wait for a legislative enactment to decide such cases. The enactment may not be forthcoming. Furthermore, the enactment may be unreasonable, unjust, overinclusive, or underinclusive. The person whose interests are at stake may be too weak or powerless to forge the political might necessary to affect a change in the law. In all such situations, the courts will be pushed to a higher-ordered framework while deciding the matter at hand. Thus, tentative guidelines enabling a court to make such a move must be in place.<sup>130</sup>

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well as substantive protections to protect rights in the long run. See GEWIRTH, *supra* note 50, at 59-66.

129. For a recent debate on the value of such legislative histories, see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29-36 (1997).

130. Here it is important to note a distinction without a difference that Kamisar seems to rely on, in his most recent discussion of the right to die, when he states: "As for drawing lines where they should not be drawn, this author submits that if a court believes respect for 'self-determination' and 'personal autonomy' entitles a competent person to decide when and how she chooses to end her life, that 'right' or 'liberty' should not be (and will not be) limited to the 'terminally ill.'" KAMISAR, *supra* note 43, at 489-90. The quote seems related to what he later adds: "[I]f



These guidelines are essential if the law is to be part of a governing morality that provides for a broad social duty of obedience, including a judicial duty to follow law, and protection for fundamental human rights. Right to die cases require our constitutional jurisprudence to invoke meta-principles capable of selecting the appropriate level of abstraction necessary to render a moral decision. If the society's political morality in this area is uncertain (*Glucksberg* and *Quill* were, after all, rather narrow decisions), then it may be necessary for a court to appeal beyond social morality to a theory of natural law/natural rights to reach a decision. This occurrence will also mean that it will be necessary for the court to very carefully choose which theory of natural law/natural rights to adopt if its own legitimacy is not to be called into question. Thus, it will be particularly important for the court to present the view that it adopts in such a way as to enhance its own legitimacy by showing how the protections it secures would include other fundamental rights that people are thought to share.<sup>131</sup>

Since the Court in *Glucksberg* and *Quill* left the ultimate questions open, it may be helpful to its own future decisions, as well as to other courts and legislatures who will be called upon to consider similar questions, to now take up the broader issues of doctrine that might arise in these cases. In order to conduct such an analysis, however, I will need to follow an approach opposite to the one usually followed by the judiciary. Rather than moving from the specific to the general by graduated pragmatic steps, I will begin at the highest level of relevant abstraction and move down by a process of deduction in order to suggest what factual distinctions may be important for future courts to

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autonomy is crucial, the requirement of unbearable suffering would appear to be entirely subjective. Who is to say—other than the patient herself—how much suffering is too much?" *Id.* at 506. But this is a misuse of Wittgenstein's notion of a private language game. The fact is that we do make such statements and understand them all the time as any parent (or friend) knows who has told their child (friend), "look, you will get over it." The point is that "meaning is relational because it is a normative notion: to say X means Y is to say that one ought to take X for Y; and this requires a legislator to determine that one must take X for Y, and a citizen to obey. And the relations between these two is not merely causal because the citizen can disobey: there must be the possibility of misunderstanding or mistake." KORSGAARD, *supra* note 126, at 137-38. With my example, the person who determines that they cannot bear the pain any longer is subject to being told by their parent or friend that they can; perhaps, that other person has been in a similar situation. Thus, the idea that one cannot understand the language of another's suffering, even though there is no direct access to the suffering as such, is simply wrong. We do it all the time, and it is probably part of the universality of our psychology that we can.

131. I take it that most people in a democratic society would, at least, expect their political institutions to afford the maximum possible amount of freedom and well-being equally to all people. Even if a person were a die-hard libertarian, she could agree that this is an end of democratic institutions since such institutions, unlike the private sector, should not themselves discriminate among peoples.

consider. In short, I will be taking the road of the political philosopher, who asks how the legal system is justified, rather than the legal philosopher, who is more concerned with how law becomes justified.

Most future cases in this area do not need to approach the highest level of political morality since most cases could be decided on privacy grounds, if privacy is considered to be a part of autonomy.<sup>132</sup> This idea is true because a mere description of the act of ending one's life does not in and of itself suggest a conflict with anyone else's interest.<sup>133</sup> Nevertheless, at this point I will take the higher approach of the political philosopher to illustrate how, notwithstanding current disputes about privacy, *Glucksberg* and *Quill* could be made consistent with a very different set of results in future cases.<sup>134</sup> This analysis reinforces the idea that even if current privacy law is in flux, right to die cases may establish the connection between the current law of privacy, and society's commitment to preserving autonomy as a value. Again, my point is not to suggest that courts should actually proceed in such a manner. This approach may open too many theoretical questions, such as the objectivity of a moral position, which most courts are not prepared to answer. Rather, my point is simply to set forth a coherent political morality that may provide the necessary background rights that a future court will be able to rely upon in order to engage and decide cases in this area. With this in mind, consider the following theory derived from the concept of agency as a possible candidate for this highest level of political morality.

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132. See *SAMAR*, *supra* note 14, at 196-203; see also Jonathan R. MacBride, Comment, *A Death Without Dignity: How the Lower Courts Have Refused to Recognize that the Right of Privacy and the Fourteenth Amendment Liberty Interest Protect an Individual's Choice of Physician-Assisted Suicide*, 68 *TEMP. L. REV.* 755, 771-76 (1995); but cf. Edward A. Lyon, Comment, *The Right to Die: An Exercise of Informed Consent, Not an Extension of the Constitutional Right to Privacy*, 58 *U. CIN. L. REV.* 1367 (1990) (arguing that the right to refuse life-sustaining medical treatment is not protected by the constitutional right to privacy).

133. The point here is that "[a]n action is self-regarding (private) with respect to a group of other actors if and only if the consequences of the act impinge in the first instance on the basic interest of the actor and not on the specified class of actors." *SAMAR*, *supra* note 14, at 68. Thus, private acts are relational, but not relative, assuming we are able to unravel a priori two distinct ideas that make up the definition. The first is what we mean by "in the first instance." Here, it is simply that the mere description of the act "without the inclusion of any additional facts or causal theories" suggests a conflict. *Id.* at 65. The second is what we mean by a "basic interest." Basic interests "are independent of conceptions about facts and social conventions." *Id.* The point of these two further definitions is not to say privacy will never conflict with some important social interest or some other right. As will be argued *infra*, that would occur if the justification for the right also justified the other right or interest. Presumably, the conflict would be resolved by asking whether the other right or interest better promoted, or protected, autonomy in general. For now, it is enough simply to make plausible when a claim to privacy exists.

134. In *Cruzan*, the Supreme Court relied on the liberty interest protected by the Due Process Clause rather than the right to privacy. 467 U.S. at 261.

Agency is a useful starting point for this analysis for the same reasons that Gewirth suggests it applies to moral theory.<sup>135</sup> Any theory of political morality, including any theory of law that seeks to import a duty to obey law, must presuppose that the people it is addressing are voluntary purposive agents if it is to be able to prescribe prescriptive oughts.<sup>136</sup> This statement is as true in law as it is in morality because the concept of action is central to any legal enterprise.<sup>137</sup> Thus, following Kant's famous dictum, "ought implies can," if one cannot perform some act, one ought not to be obliged to do so.<sup>138</sup> Accordingly, voluntarism and purposivism, which necessarily invoke concerns for freedom and well-being, are essential ingredients to the existence of a duty to obey law.<sup>139</sup> It is also appropriate to restrict what we mean by "rationality" to the canons of deductive and inductive logic.<sup>140</sup> This restriction is necessary to avoid the backdoor entry of unnecessary biases from creeping into the analysis as might come about, for example, when rationality is thought of as cost/benefit analysis. In such a case, concerns about costs, when allocated among enough people, might out step important rights that only few will claim.

Taking agency as our first principle, we begin by making several factual distinctions which were not relevant to the recent Court decisions, but are likely to become important in future cases. The first distinction concerns the difference between being in a persistent vegetative state and being in a temporary coma. The second distinction concerns being in a conscious terminally-ill state, especially one of excruciating pain and suffering, versus being in a coma. The third distinction concerns not being either terminally-ill or in a persistent vegetative state, but still not wanting to live. With regard to the latter,

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135. In *Reason and Morality*, Gewirth takes agency as the starting point because voluntariness and purposiveness are the basic aspects of human action that all moral theories must presuppose. GEWIRTH, *supra* note 123, at 26-27. The same is true for legal theory. BEYLERELD, *supra* note 109, at 33.

136. GEWIRTH, *supra* note 123, at 26-27.

137. Deryck Beyleveld and Roger Brownsword have noted that a legal enterprise and knowledge of it involves human action, and that it is the same concept of human action that is involved in all moral reasoning. Consequently, if the concept of human action can be shown to commit an agent to accept a supreme principle of morality, that same principle will apply when human conduct is brought within the fold of the legal enterprise. However, this means that legal phenomena can be properly judged in terms of this moral principle. See BEYLEVELD, *supra* note 109, at 161-62.

138. *Id.* at 68; see IMMANUEL KANT, CRITIQUE OF PURE REASON A548/B576 (1787).

139. See William Rehg, *Introduction in Jürgen Habermas, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY BETWEEN LAW AND DEMOCRACY*, xix (Rehg tr. 1996).

140. GEWIRTH, *supra* note 123, at 22.

I assume there is some substantial pain and suffering as a reason for wanting to die.

The above distinctions are important because they bring out an otherwise hidden aspect of saying that the right to die is a fundamental right. Such an aspect arises because of a confusion in the word "fundamental." The confusion manifests itself when issues of both the coverage of the right (what actions the right subsumes) become conflated with its protection (i.e., the strength of the right when compared against other rights or state interests with which it may conflict). If the right to die were treated as the final moral arbitrator in each of these disputes, then all three of the above situations would fall not only under its umbrella, but each would be decided in the same way since there is not an instance where we have reason to believe that the right's protection is limited.

*Glucksberg* and *Quill* would be wrongly decided merely because they dared to allow an exception. As with abortion, neither the states nor the federal government may unnecessarily burden the patient's choice with regulations.<sup>141</sup> In the case of abortion, the burden is directed toward the mother's choice, prior to the unborn's viability. If it were necessary for the courts to extend the coverage of the right to consensual physician-assisted suicide in order to protect the effectiveness and practicality of the right to die, that should also occur.

We could not limit the scope of the patient's right to die in any of these instances by saying simply that in some cases it does not apply. Additionally, we could not say that even if a case fell under the coverage of the right its protection would be offset by a compelling state interest.<sup>142</sup> Such a statement would involve justification that presumably would not be arbitrary, but nevertheless impedes the apparent fundamental character of the right to die. Consequently, we must be careful to state exactly what we mean when we say that the right to die is fundamental.

The right to die cannot be an expression of the highest standard for determining what a person is constitutionally allowed to do if the ground for the right is to be based on a principle that might allow for exceptions. In right to die cases, both the protections of liberty and well-being may play dual but sometimes opposite roles. This idea suggests the possibility of different outcomes depending on how these two justificatory factors balance each other out in a particular factual context. Of course, we want consistency over a whole range of mor-

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141. *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992).

142. For a discussion of the role the coverage/protection distinction plays in fundamental rights cases, see, e.g., SCHAUER, *supra* note 51, at 131.

ally similar situations. For these reasons, the right to die must be justified by a middle-level principle governing a range of cases, but one that may itself be subject to a still higher moral standard.<sup>143</sup> It is in this sense that I claim that the right to die might be thought of as governed by, and consequently less fundamental than, the right to privacy of which it is a part. Moreover, the latter may be less fundamental than a still higher-ordered principle of autonomy which preserves voluntary purposive action.<sup>144</sup> To allow otherwise would offset, without justification, any interest a state might have, for example, in the preservation of life. Such a position is hard to contemplate.

The right to die is certainly based on principles that in themselves are arranged in successively higher orders. This is enough to resolve conflicts with other values which the state has a compelling interest in promoting. In order to discover what these other values are, however, we need to know two things. First, what is the scope of the right to die, that is, what types of cases does it encompass? Second, what is its degree of protection when compared to other rights or interests the state may have a compelling reason for protecting? As will be seen below, the latter is related to how the right to die is justified in terms of a succession of higher-ordered principles from an external point of view.

With respect to the first of these two issues, the right to die can be seen to encompass two distinct case situations. The first concerns the case wherein the entity that will be assisted or left to die is not a person in the relevant sense. The second concerns a person who has made a decision to terminate his own life. In the second case, we must distinguish between choosing how to die, where one has a fatal disease, and choosing to die where no such disease exists. While both situations involve when one dies rather than if one dies, they are dis-

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143. In the moral arena, a related doctrine applies. Moral evaluations are often divided between moral judgments about what to do in a particular situation, moral principles about how certain types of decisions should be handled, and the moral standard which is the supreme over-riding principle that justifies all other moral principles. See *APPLYING MORAL THEORIES* *supra* note 97, at 56-63. While the three levels of analysis go from the most concrete to the most general, the justification for a decision at each level proceeds in the opposite fashion. This reflects the dual nature of moral reasoning: that it proceeds from practical questions to theoretical ones, although ultimately it must justify any practical decisions on the basis of theoretical determinations. The same is true of law.

144. Here, privacy involves only interests which by definition do not effect others. In right to die cases, the interests of others may also not be directly involved. But insofar as the self-seeking freedom has an opposite interest to the self-choosing well-being, a conflict between these two justificatory components of the same right to die exists within the self. In this sense, the right to die is less closely a pure liberty right than the right to privacy of which it is a part since the self's well-being is also involved. See *SAMAR*, *supra* note 14, for a more general discussion of the right to privacy.

tinguishable by the type of loss to agency that will occur if the death comes about earlier than would otherwise have been the case. At this point, the second issue of the right's protection also becomes relevant because there presumably may be other important interests at stake where death is chosen though life could still be maintained. I will deal with each of these issues in turn.

In determining whether the entity that will be aided or left to die is a person, the central question is not whether it is alive but whether it is an agent. This follows what all moral theories have in common. Each theory addresses the behavior of voluntary purposive beings.<sup>145</sup> Possessing voluntariness and purposiveness are essential ingredients both to being the bearer of a right's claim or the respondent to someone else's rights.<sup>146</sup> The idea is not that trees, for example, do not have rights, but they cannot be bearers of their own claims or the respondents to others claims against them.<sup>147</sup> Essentially, the point is that being an agent is a priori to having moral rights.<sup>148</sup> Still, it may be argued that the issue for determination should be the existence of life and not agency.<sup>149</sup>

The analytical problem with making life the determining factor is that it is not exactly clear what is to be protected. Are we to protect any and all biological life? If this is the case we must conclude *prima facie* that not only is the law that allows abortion wrong, but so are all of our other laws that allow for the withdrawal of life-sustaining support or the taking of lives, including through the use of the death penalty.<sup>150</sup> If it is specifically human life that is to be protected, the next logical question is what do we mean by human? Are we talking about having a certain number of chromosomes, and if so, why should that matter? If the issue is one of a religious matter, such as having a soul, how do we prove humans have souls? This is, of course, setting aside the fact that it would be difficult to justify using religion as a basis for

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145. See GEWIRTH, *supra* note 123, at 26-27.

146. Animals with pain-receptors have a right to be free from wanton infliction of pain. But this is a minimal right based on the fact that animals approach agency (although they are not agents) by their capacity to experience the debilitating effects of pain. See *id.* at 144.

147. See *Sierra Club v. Morton*, 405 U.S. 727 (1972) (J. Douglas, dissenting) (arguing that inanimate objects should have standing when they are about to be despoiled).

148. Not all moral theories make this claim or may even recognize this claim. But I would assert that any moral theory must presume that those it addresses are voluntary purposive agents. This follows from Kant's dictum of "ought implies can." Otherwise, the theory would simply not be a moral theory.

149. For example, the Thomist position, followed by conservative philosophers in the Roman Catholic church, treats life as a more basic value. See ST. THOMAS AQUINAS, *Concerning the Nature of Law*, in *THE BASIC WRITINGS OF SAINT THOMAS AQUINAS* 750 (A. Pegis ed. 1945).

150. See Dworkin, *The Great Abortion Case*, N.Y. REV. OF BOOKS, June 29, 1989, at 50.

decisions in a pluralistic society that subscribes to a doctrine of separation of church and state. If the matter concerns being sentient, feeling pain or having emotions, then certainly animals have some of these traits, and thus, morality requires that they not be caused unnecessary pain. Does this idea also require that animals not be killed for food, for example?<sup>151</sup> If the concern is that humans have a unique set of experiences in the sense of having a unity of consciousness, then the question arises, what is it about having consciousness that provides one rights?<sup>152</sup> A pluralistic society might recognize nonagents as having rights, but the question which follows is what is the foundation for these rights?

Each of these questions assists in demonstrating that a common ground for connecting certain entities to the notion of having moral rights, even in a pluralistic society where different views are present, is at least the concept of human agency.<sup>153</sup> Therefore, human agency should be our starting point since all moral theories, no matter what else their contents may be, must presuppose the concept.<sup>154</sup> Any other condition that might be brought into such an enterprise, unless it could be shown to be equally a priori in the sense I described above, is likely to be far more controversial and uncertain, especially in a diverse pluralistic society, than human agency. Since human agency alone is necessarily presupposed by every moral theory, any other condition could easily restrict who has rights to less than all human agents in ways that appear to be morally unjustifiable.<sup>155</sup> Based on this knowledge, voluntarism and purposivism must be at the heart of any principle supporting what courts should do in deciding cases that involve fundamental rights.<sup>156</sup>

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151. The area of animal rights is quite controversial. For an argument in favor of animal rights see Peter Singer, *All Animals Are Equal in Animal Liberation*, N.Y. REV. 1-22 (1975); but see R. D. Guthrie, *Anthropocentrism in The Ethical Relationship Between Humans and Other Organisms*, 2 PERSPECTIVES IN BIOLOGY AND MEDICINE (1997-1998).

152. See SAMAR, *supra* note 14, at 172.

153. See GEWIRTH, *supra* note 50, at 46.

154. See GEWIRTH, *supra* note 123, at 26-27.

155. Gewirth shows that acting contrary to the basic moral principle derived from agency, namely, the Principle of Generic Consistency, forces the actor into contradicting him or herself. For this reason, it cannot be morally justified. See GEWIRTH, *supra* note 123, at 327-28.

156. Voluntarism and purposiveness are not themselves the moral standard but rather the moral standard is elements. From these two elements a moral standard might be derived which would have applicability to fundamental rights issues. For this article, I have avoided Gewirth's formal proof of his Principle of Generic Consistency as the moral standard to avoid further complication to an already difficult area. For a fuller account of Gewirth's discussion including the derivation of his supreme principle of morality see GEWIRTH, *supra* note 123, at 3. That principle states: "Act in accord with the generic rights [i.e., the rights to freedom and well-being] of your recipients as well as yourself." *Id.* at 135. Though I have not made specific reference to

Given that agency, in the sense of voluntary purposive behavior, is a basis for determining the scope of all rights, including the right to die, we can answer the first question of who is a person by analytically setting forth the criteria of when someone is an agent. An analytical approach works here because the question is about what we mean by a person. Moreover, the criteria we are going to rely upon to answer the question of voluntariness and purposiveness must be central to any moral theory. Thus, an agent is one who can act voluntarily for one's own purposes.

At this point, I follow Gewirth in stating that by "voluntarily," I mean that the agent acts by his own unforced choice. In stating purposes, I refer to the goals that the agent has a pro-attitude toward securing, whether or not those goals may also be moral.<sup>157</sup> Accordingly, every normal adult is an agent. Insofar as he or she is not suffering a debilitating cognitive function, the person is capable of acting voluntarily, at least mentally, for purposes they believe to be good.

What about persons who are asleep or in a temporary coma? Such persons are prospective agents in that all the necessary capacities for full-fledged agency are present, even though at the moment they may be prevented from exercising these capacities. In contrast, persons in a persistent vegetative state, as well as the unborn, are not agents (actual or prospective). At most, the latter may be potential agents because the capacities do not yet exist to being full-fledged agents.<sup>158</sup>

In this respect, one sees an analogy to the way one might speak of their automobile. At the time one places an order for a new automobile, the plant may not yet have the vehicle in stock but only the raw materials to make the car. At this stage, one might say that the plant has a certain potential, based on available resources, to fill orders for some number of automobiles. On the other hand, one who has an automobile that is not running—maybe it needs gas, spark plugs, a new accelerator, etc.—still owns a prospective automobile because all the essential mechanisms are in place for the automobile to run. The automobile simply needs "ordinary" supports that any owner would expect to provide by virtue of owning an automobile. The situation is completely changed when one speaks of an automobile that has been totaled other than in the insurance sense of the term.<sup>159</sup> In that case,

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the principle in this text, it should be understood that my discussion of the moral standard is in terms of that principle.

157. *Id.* at 27.

158. The unborn are not agents because they cannot act by their own unforced choice with knowledge of relevant circumstances. Especially at an early stage of a pregnancy, even the idea that they could is not plausible. See SAMAR, *supra* note 14, at 172-81.

159. The point here is functionality rather than marketability.



only metaphorically does one have an automobile. What one really has is a pile of junk.

The analogy applies equally well to agency. One who is in a persistent vegetative state is like the automobile that is totaled, whereas one who is in a temporary coma or asleep is like the car in need of gasoline, while the unborn are similar to the raw material awaiting assembly at the automobile plant. I do not mean to suggest that the unborn are like the raw materials entering an automobile plant with respect to their importance to society. Clearly, the unborn are distinguishable if for nothing other than their symbolic significance.<sup>160</sup> However, in the sense that the unborn are potential and not actual or prospective agents, the analogy does hold to limit the kinds of claims that can be made on behalf of the unborn.

What this idea suggests is that the right to die is strongest where the entity being assisted or allowed to die is not even a potential agent, especially if keeping the entity alive involves keeping it in unnecessary pain and suffering. Conversely, the right is weakest where the entity is a full-fledged agent because the state may have a legitimate interest, based in protecting autonomy generally (not to mention all the other interests cited in *Glucksberg* and *Quill*), to keep the agent alive. This brings me to the second situation which requires addressing.

The right to die, along with the state's interest in protecting life, attaches to a moral standard of autonomy; namely, a moral standard that our constitutional system ought to protect because it is both an end of democratic government and a reason for supporting democratic government.<sup>161</sup> More precisely, the autonomy principle justified in this context is the right to perform private acts. In other words, the right to perform private acts which do not attack the basic interests in freedom and the well-being of other actors is the idealization of the autonomy principle at work.<sup>162</sup> Since any act can be said to affect someone's interest, the key to a *prima facie* determination that a truly private act is involved in any given case is whether one can describe the act without the inclusion of any additional facts or causal theories that would suggest a conflict with another's basic interests. In stating basic interest I mean an interest in freedom or well-being excluding outside facts or social conventions. If a court subsequently deter-

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160. See generally RONALD DWORKIN, *LIFE'S DOMINION* (1993) (arguing that a limited claim—one that would not defeat all abortions—can be made to protect the unborn for the sake of maintaining the symbolic significance that human life is sacred and should not be too easily taken).

161. See SAMAR, *supra* note 14, at 89-90.

162. *Id.* at 96-97.

mines, as a matter of fact, that other interests are involved, it must also determine whether those other interests are important enough to restrict the privacy at stake. One way to perform this determination, given that a principle of autonomy can serve as the common denominator for grounding privacy and presumably the other interest the state is asserting, is for the courts to determine which right or interest better serves autonomy in general.<sup>163</sup>

Since the right to die, under this conception, is a part of the right to privacy, the autonomy principle that justifies the right to privacy must also justify the right to die.<sup>164</sup> The grounding here is higher-ordered. This means that in a democratic society, the right to die can be mitigated only when necessary to protect a competing principle also justified by autonomy. The key point is that the right to die is an active right, one that provides freedom to perform the action of terminating one's own life without interference. Consequently, the only time the right to die can be interfered with is when the state demonstrates that protecting the right to die will more likely diminish the current level of overall individual autonomy, including its necessary component of well-being, than protecting the right to die.<sup>165</sup>

In this instance, a compelling state interest is any interest of the state that is more essential to the protection of autonomy in general than is protecting, in this context, the right to die.<sup>166</sup> If the state is seeking to protect a competing principle, for example an interest in preserving life, then the burden the state will have to shoulder in order to support its interest is to show that preserving life is more essential to the protection of autonomy in general than protecting the individual's right to die.<sup>167</sup> Such an option would likely be true, for

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163. Here, I note that the right to privacy will only conflict with other rights or interests in which autonomy is a common ground. *Id.* at 103-16. Because the right to die will occasionally conflict with other rights and interests, it can be regulated on the basis of which right better promotes, or which interest better protects, autonomy in general. *Cf.* SAMAR, *supra* note 14, at 104-17; but *cf.* Patrick M. Curran Jr., Note, *Regulating Death: Oregon's Death with Dignity Act and the Legalization of Physician-Assisted Suicide*, 86 GEO. L.J. 725, 736 (1992) (arguing that Oregon's Death with Dignity Act cannot be adequately regulated to avoid a slippery slope from voluntary euthanasia to involuntary euthanasia).

164. For a further discussion of this issue, see SAMAR, *supra* note 14, at 199-203 (1991).

165. See Note, *Physician-Assisted Suicide and the Right to Die with Assistance*, 105 HARV. L. REV. 2021, 2032-37 (1992).

166. See SAMAR, *supra* note 14, at 199-200.

167. See SAMAR, *supra* note 14, at 112-17. Kamisar argues that the relevant definition of autonomy should be "unwanted bodily intrusion" rather than the private act sense of autonomy I suggest. See Kamisar, *supra* note 43, at 489-90; See Kamisar, *Against Assisted Suicide—Even a Very Limited Form*, 72 U. DET. MERCY L. REV. 735, 757 (1995). Elsewhere, I have rejected this narrower sense of autonomy. See SAMAR, *supra* note 14, at 56; see also Lawrence O. Gostin, *Drawing a Line Between Killing and Letting Die: The Law, and Law Reform, on Medically As-*

instance, in the case of an otherwise healthy person, or at least one who is not ill or in excruciating pain, but who is still sufficiently distraught and wishes to die. It may even be true for the terminally ill patient who seeks to end his life but is currently not in great pain or suffering. The point in both of these latter situations is to allow the state to investigate whether the decision to end one's life is a rational one. In the former case, it would be necessary to determine whether the person was acting under a short term, but nevertheless powerful emotional response to a situation in which relevant alternatives had not been fully assessed.

In the latter situation, it may be whether the decision is based on how, for example, one might want to be remembered. This is especially true if the ability to take care of oneself is expected to be increasingly difficult as the disease progresses. Of primary concern would be that the decision not be based merely on outside factors of finance, imposition on family members, or foreknowledge that dying will soon result. Under these circumstances, such factors may be more coercive than assessable. This means only that some intrusion by the state for the sake of honest inquiry about one's motivations is justified to insure that all relevant information, especially about outside financial and other forms of support are known to the patient. However, the state should not use such reasons as a deceptive disguise to delay a patient's decision. The intrusion is allowed because, in such a situation, the self's freedom appears to be in conflict with its well-being. Moreover, under these circumstances, the very nature of the conflict suggests how any dispute over the patient's decision should get resolved. Since autonomy is the common denominator for both the right to die and the state's competing interest to preserve life,<sup>168</sup> the state would have a good reason to intervene for the sake of insuring that the person was acting rationally where, once again, rationally means employing canons of inductive and deductive logic with knowledge of relevant circumstances. Once that is done, however, no further intrusion is justified and the state must leave any further decision up to the individual.

In the case of the psychologically distraught person, the state would be further justified to require that the person obtain psychological help before a final decision could be recognized. This would ensure that any conflict between the self's freedom and well-being is not the result of some irrational psychological impulse. Even under circum-

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*sisted Dying*, 21 J.L. MED. & ETHICS 94, 98 (1993) (arguing for a qualified right to assisted suicide on the ground that the right to die is a fundamental autonomy right).

168. See SAMAR, *supra* note 14, at 200.

stances such as these, there would come an end to the intrusion, whereby the person was deemed to be psychologically capable of rationally making such a determination.

What does all this say about the right to die? It says that even though the right to die may be offset in cases such as these, it does not disappear from our analysis of the situation. It may be transferred to a back burner, but it remains on the stove. As such, it places a limit on just how far the state can go in asserting its compelling interest. This limit is that the maximum intrusion on the right to die is the minimum necessary for the state to achieve its compelling interest. In the above cases, the limit on the intrusion would be the point where the person was judged to be rational and not causing harm to others. The latter would also take into account whether the person was under a special duty, like a parent to a child, which was incurred voluntarily. Any further intrusion would unnecessarily diminish, rather than protect, individual autonomy, making all such decisions grounds for placing the individual under the paternalistic control of the state.

Consequently, in the case of the temporary coma, the state's interest in protecting life would appear to outweigh any claimed interest by a guardian to allow the patient to die. A similar result should occur in the case of the full-fledged agent who is merely in a distraught state of mind. On the other hand, if the prospective life of a terminally ill patient is one of suffering either excruciating pain or medication to the point of incoherence, the state's interest will not outweigh the individual's right to die. Even in the case of the fully sane and relaxed individual who has made the decision to die, the state's interest may not outweigh the individual's interest provided that the individual is acting rationally with knowledge of relevant circumstances and not in derogation of any pre-existing duties or responsibilities. Determining whether the individual is acting in this way, of course, justifies at least some state intervention to the point of making an adequate mental and practical judgment based on reasonable medical, psychological, and other evidence.<sup>169</sup> Beyond such intervention, the problem becomes not only theoretical but practical. How can the state continuously prevent someone who is bent on killing himself from doing so without an incredible intrusion on his basic liberties? Certainly, the state can restrict others from assisting in such suicides by criminal penalties. In the case of doctors, the state can revoke their licenses to practice medicine. However, there is not much else which can or should be done.

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169. Cf. KAMISAR, *supra* note 43, at 511.

The purpose of this doctrinal discussion is to illustrate that higher-ordered moral principles do exist. Future courts can take these principals into account should they be confronted with a more particularized case, as was alluded to by the Justices in the *Glucksberg* and *Quill* decisions. From within the internal point of view, it would not be inappropriate for a future court to move in an orderly fashion to a higher level of analysis as needed to decide a case. This is the point of my analysis of the metaprinciple in *Glucksberg* and *Quill*. We are by no means at the end of the line in the realm of the right to die. *Glucksberg* and *Quill* are consistent with the door being left open to a judicially broader recognition of a right to die in future cases. Thus, from both an interpretative understanding of how courts operate and a doctrinal one of the requisite principles available, there will be much more to do when future cases in this area come along.

## VII. CONCLUSION

In this article, I have sought to do more than merely regurgitate recent Supreme Court cases on the right to die. I have sought to place the entire discussion inside the context of a morality based decision-making model that both explains the Supreme Court's recent decisions in *Glucksberg* and *Quill*, while at the same time providing a ground for how the Court might follow a different track without contradiction in a related future line of cases. The approach I have followed, insofar as it engages a meta-theory of legal decision making, illustrates the need to sometimes move to broader levels of abstraction, as might be indicated by the move from what the law actually says to society's political morality, to a more modern natural law/natural rights approach. This approach also provides a basis for discerning under what circumstances any of these moves might be justified in the right to die area. In future cases involving the right to die, the factual circumstances may vary considerably from what they were in *Glucksberg* and *Quill*. If that happens, the underlying principles protecting the freedom and well-being of the person seeking to die will not always be following the same route and, consequently, the decisions will not always be the same. However, in all such cases the decisions reached will be principled, provided an approach like the one suggested here (or one very similar) is undertaken. Consequently, this article is offered as a tool to ascertaining a clearer understanding both of what the Court has done in its recent right to die decisions as well as what courts and state legislatures might do to ensure a morally principled development in this area of the law.